



Neutral Citation Number: [2026] EWHC 1909 (TCC)

Case No: HT-2025-000215

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

The Rolls Building
Fetter Lane
London
EC4A 1NL

Friday, 5th June 2026

Before:

MR JUSTICE EYRE

Between:

**MACKENZIE MILLER
DEVELOPMENTS LIMITED**

**Claimant/
Respondent**

- and -

WITHERLEY CONTRACTING LIMITED

**Defendant/
Applicant**

Nicholas Towers (instructed by **Shakespeare Martineau LLP**) for the **Claimant/Respondent**.
Martin Hirst (instructed by **Knights Professional Services Ltd**) for the **Defendant/Applicant**.

APPROVED JUDGMENT

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MR JUSTICE EYRE:

1. I have before me two applications, both made by the Defendant/Part 20 Claimant Witherley Contracting Limited (“Witherley”) against the Claimant, Mackenzie Miller Developments Limited (“Mackenzie Miller”). The applications are (a) for judgment in default of defence on the counterclaim and (b) for a stay on the footing that the proceedings should be stayed under the court’s inherent jurisdiction and/or the case management powers under CPR 3 in the circumstances I will outline shortly.

The History.

2. The relevant chronology is significant.
3. The parties entered a sub-contract for groundworks in respect of property in Chipping Norton in November 2022. Mackenzie Miller served a notice of termination in March 2024, but a couple of days after that Witherley issued a payment application in the sum of £76,316.30. That payment application was referred to adjudication. On 23rd April 2025 the adjudicator issued an award finding that Witherley was entitled to the £76,316.30 together with interest and the adjudicator’s fees.
4. In June 2025 Mackenzie Miller’s solicitors wrote to Witherley saying no payment would be made. In July 2025 Knights Solicitors were instructed on behalf of Witherley. On 4th July 2025 they wrote requesting payment and threatening enforcement proceedings in default of payment. On 8th July Mackenzie Miller’s solicitors confirmed that a payment would not be made.
5. On 10th September Mackenzie Miller issued the current proceedings in the TCC in London. The claim sought damages for breach of contract arising from alleged wrongful termination. By then, however, Witherley had already issued proceedings in the Technology and Construction Court in Bristol seeking to enforce the adjudication award.
6. On 12th September 2025 HH Judge Russen KC heard Witherley’s enforcement application and granted judgment in Witherley’s favour. Judge Russen then stayed execution pending evidence of solvency. That was light of the contention from Mackenzie Miller that Witherley was insolvent and, in effect, that if payment was made the sums would be dissipated before the resolution of the larger dispute as to wrongful termination or otherwise.
7. Witherley acknowledged service in the current proceedings on 19th September 2025. On 15th October 2025 it filed a defence and counterclaim denying that there had been a repudiatory breach. In its counterclaim Witherley sought damages saying in summary that there had been a repudiatory breach by Mackenzie Miller which had caused Witherley loss.
8. The 15th October date for service of Witherley’s defence was the result of an agreed extension of time of 7 days. The parties then agreed an extension of time for the service of the defence to counterclaim to 5th December 2025. However, as will be seen, no defence to counterclaim was served at that date.

9. Reverting to the Bristol proceedings, on 8th January 2026 HH Judge Russen heard further argument and considered further material. The judge concluded that the stay of execution should be lifted. This was on the footing that he was not satisfied there was a sufficient question mark over the solvency of Witherley to justify maintaining the stay. Judge Russen ordered payment of sums totalling £107,337.35 by 22nd January 2026. Mackenzie Miller has not paid that sum.
10. Mackenzie Miller says quite frankly through Mr Towers that, notwithstanding Judge Russen's decision, it does not intend to pay the sum ordered. That is because it retains its concerns as to the solvency of Witherley. It says that if payment is made the money will simply disappear and that it will be left, if it is ultimately successful in the current proceedings, with a worthless judgment having paid out sums to Witherley. As a fallback position, Mackenzie Miller would be prepared for the sums to be paid to be held by Witherley's solicitors as a form of escrow.
11. On 2nd April 2026, Witherley issued the current application, seeking judgment in default on the counterclaim for £164,881.52 together with a stay of the claim pending payment of the sum due pursuant to HH Judge Russen's order.
12. On 6th May 2026, so some five months – in fact six months – out of time, Mackenzie Miller served a defence to counterclaim.
13. The matter is listed for a costs in case management hearing on 18th June of this year.

Judgment in Default.

14. The relevant rule is CPR r.12.3 which provides as follows at 12.3(1) and (2). (For these purposes claimant is to include defendant claiming on a counterclaim):
 - “(1) The claimant may obtain judgment in default of an acknowledgement of service only if at the date on which judgment is entered—
 - (a) the defendant has not filed an acknowledgement of service or a defence to the claim (or any part of the claim); and
 - (b) the relevant time for doing so has expired”.
 - (2) Judgment in default of defence (or any document intended to be a defence) may be obtained only—
 - (a) where an acknowledgement of service has been filed but, at the date on which judgment is entered, a defence has not been filed;
 - (b) in a counterclaim made under rule 20.4, where at the date on which judgment is entered a defence has not been filed”.
15. Mr Hirst, for Witherley, says that no valid defence to counterclaim has been filed here. He says that the purported statement of case filed on 6th May 2026 was substantially out of time in circumstances where there had been no extension of time either by court order or by agreement of the parties. Mr Hirst says that the Rules are to be read as

requiring there to be a valid defence in circumstances where a document filed out of time is ineffective.

16. Mr Towers for Mackenzie Miller says that the position is not as straightforward as that. He says that the Rules quite clearly refer to a “defence (or any document intended to be a defence)” without any gloss requiring a valid defence. Mr Towers refers to the explanatory notes to The Civil Procedure (Amendment) Rules 2020 which amended rule 12.3. He refers to the clarification there as indicating the rule means that an acknowledgement of service or a defence will be a bar to an entry of judgment in default so long as it is filed before judgment is entered.
17. Mr Towers refers me to the notes in *The White Book* at 12.3.2 and 15.4.2 which indicate the views of the editors that the filing of a document purporting to be a defence, even if out of time, will be effective to preclude judgment in default. That appears also to be the view of Adrian Zuckerman in writing in *Civil Procedure* and the editors of *O’Hare & Brown on Civil Litigation*.
18. The question was considered by HH Judge Hacon in the case of *Antonio e Paolo Gensini s.n.c & Anor v CCK Gifts Ltd & Anor*, a case which does not appear to have a neutral citation number but which was a decision of Judge Hacon of November 2024. There at [8] and following, Judge Hacon took the view that judgment in default will be precluded by a defence filed out of time.
19. That also was the view expressed, albeit by way of explanation of a difference between the English rules and the procedural rules of the courts of the Eastern Caribbean, by Lord Leggatt in *Lux Locations Ltd v Zhang (Antigua and Barbuda)* [2023] UKPC 3. At [61] Lord Leggatt addressed the position in England and Wales and said that the effect of the amendment in 2020 to the CPR r12.3 was to give effect to the view that judgment in default of defence could only be obtained where a defence had not been filed, regardless of whether the defence was filed in time.
20. I have considerable sympathy with Mr Hirst’s submissions and, absent authority, would have seen considerable force in them. However, it is clear that the authors of the Rules intended the position to be that judgment in default should be genuinely in default of a defence. The intention was that the matter should normally be determined simply by looking at the documents on the court file to see whether there is or is not a defence filed rather than by exploring the position any further.
21. I make it clear that, in concluding as I do, that the defence to counterclaim served on 6th May precludes judgment in default, I am not ruling on the status of that document as a defence at trial. It seems to me that different considerations might well apply there. It might well be said that in the absence of an extension of time, albeit one granted retrospectively by the court, Mackenzie Miller is in the position of not having a defence to the counterclaim to put before the court. Different considerations might very well apply when considering whether there should be judgment in default from those which apply when considering whether a claimant is able to put forward arguments in defence of a counterclaim. However, that will be a question for another day and I am making no ruling in that regard.
22. It follows that the application for judgment in default must fail.

The Stay.

23. Mr Hirst contends that there should be a stay of the claim because Mackenzie Miller has acted deliberately in not complying with the order of HH Judge Russen. He says that this is oppressive conduct which is contrary to the purposes of the adjudication regime (in light of the rationale underlying that regime of for maintaining cash flow for those in the construction industry). Mr Hirst says that it is not properly open to Mackenzie Miller to bring a fresh claim while at the same time not paying the sums due pursuant to the adjudication and, more tellingly, pursuant to Judge Russen's order.
24. There is little dispute about the relevant principles. They can be seen in the decision of Akenhead J in *Anglo Swiss Holdings Ltd & Ors v Packman Lucas Ltd* [2009] EWHC 3212 (TCC). At [21], having summarized the authorities, the judge set out the principles thus:
 - (i) The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it.
 - (ii) In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.
 - (iii) The power is one that is to be used sparingly and in exceptional circumstances.
 - (iv) Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably".
25. Firstly:
 - (i) The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it.
 - (ii) In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.
 - (iii) The power is one that is to be used sparingly and in exceptional circumstances.
 - (iv) Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably".
26. At [25] Akenhead J set out the factors which caused him to conclude in that case that there was "oppressive and unreasonable" conduct justifying a stay.
27. At [26] he said:

"... this is an appropriate case for the Court to order a stay of these now consolidated proceedings until the Claimants have done what they are contractually required to do, that is pay now on the adjudication decisions and then as was always agreed argue later. There is an element of policy in this. If claimants are permitted to ignore adjudicators' decisions and seek to pursue the final resolution of the underlying disputes which have been temporarily resolved by the adjudicators, the HGCRA or its impact would be seriously undermined. The stay should remain in place until the adjudication decisions are honoured in full by the Claimants".
28. This court reverted to this question in the case of *Kew Holdings Ltd v Donald Insall Associates Ltd* [2020] EWHC 1862 (TCC). There, O'Farrell J, having reviewed the authorities, pointed out that some of them were concerned with the question of whether there could be an entitlement to start a fresh adjudication rather than court proceedings and explained that different considerations can apply to court proceedings because of

the right of access to justice. It was also of note that in *Kew* the defendant was seeking striking out of a claim rather than a stay. Moreover, the claimant had accepted that it was bound to pay the outstanding sum but had failed to do so. It was not contending that there should not be a stay pending such payment but was submitting that it would be inappropriate for the claim to be struck out.

29. Having summarized the principles, O’Farrell J said this [28]:

“I am satisfied that the Claimant is in deliberate and persistent breach of the Order dated 5 February 2019. The Claimant's repeated promises to pay the outstanding sum indicate that it could satisfy the judgment but has chosen not to do so. The commencement of these proceedings without honouring the adjudication award and the judgment, in flagrant disregard of the "pay now, argue later" regime of the HGCRA, amounts to unreasonable and oppressive behaviour. (...) I accept the submissions by Mr Smith that striking out the claim at this stage would be too draconian; the Defendant is entitled to the protection afforded by a stay of proceedings unless and until the judgment has been satisfied but the Claimant should be allowed to pursue its claims once it has paid the outstanding judgment sum”.

30. Now there are some differences between the current case and the matters which were considered in *Anglo Swiss* and in *Kew*. Thus, the current proceedings are not going over precisely the same ground as the adjudication. I have to have regard to that difference and also to the fact that it is a severe step to stay proceedings. In addition I take account of the fact that the current proceedings were issued before Judge Russen made his order of 12th September. However, they must have been issued after the application for enforcement of the adjudication was issued.
31. However, even having regard to those factors, I am satisfied that the conduct of Mackenzie Miller in the current proceedings is unreasonable and oppressive within the meaning of the *Anglo Swiss* and the *Kew Holdings* approach.
32. The position here is that there was an adjudication award as long ago as April 2025. There was a judgment in September 2025 directing that the award was to be paid. In those proceedings Mackenzie Miller advanced the argument that there should be a stay based on the risk to the solvency of Witherley. That argument initially prevailed but then there was further determination by HH Judge Russen when he concluded, after argument, that there was not a proper basis for a stay. That order of Judge Russen was on 8th January 2026 and directed payment by 26th January 2026.
33. Mackenzie Miller has chosen not to seek to appeal Judge Russen’s order but is simply choosing to deliberately not comply with it because of the persistence of its concerns. It is unreasonable and oppressive and an affront to the court for a party deliberately to say, “We are going to disregard a court order and not comply with it” while at the same time seeking to bring proceedings before the Technology and Construction Court in respect of matters arising out of the same contract.
34. The only sanction the court realistically has is to order a stay of the current claim until payment is made. Before me there was argument about whether there should be an order in the form of directing payment within 28 days or some other period. The normal

order in circumstances such as this is for there to be a stay which will be lifted on the making of payment. I will in a moment invite submissions on that, but it seems to me absent submissions, that is the appropriate course.

The Appropriate Venue.

35. These proceedings were started in the TCC in London.
36. The Claimant is based in Westwood Heath in Coventry. The Defendant is based in Nuneaton. The Claimant's solicitors are a national firm but operating for these purposes out of their Leicester office. The Defendant's solicitors are based in Wales operating out of Cardiff. This is a claim for comparatively modest sums in terms of the kind of cases which come before the Technology and Construction Court.
37. The normally appropriate course is for proceedings in the Technology and Construction Court to be issued and dealt with in the locations which are most apt for the parties and in terms of the subject matter of the dispute. For what it is worth, the subject matter of the dispute reflects premises in Oxfordshire.
38. I am satisfied that this is a case that does not need to be dealt with in the TCC in London. If the view is later taken that a High Court Judge is needed for the hearing of this case – which in my judgement is unlikely to be the position – then it can be heard in the regional centre by a High Court Judge sitting there. My current assessment is that this case does not need a High Court Judge and also that it is a case which can appropriately be dealt with in a regional centre.
39. But for the past involvement of HH Judge Russen KC in Bristol there would be no doubt but that the TCC in Birmingham would be the appropriate venue. The fact that Judge Russen dealt with the adjudication enforcement proceedings does not affect that assessment. As Mr Towers rightly said, the relevance of the matters before Judge Russen to the issues which will be determined at the trial is minimal at best. Accordingly, the matter will be transferred to the Technology and Construction Court sitting in Birmingham.

(Submissions then followed)

(This Judgment has been approved by the Judge.)