Neutral Citation Number: [2019] EWCA Civ 119

Case No: A4/2018/2861

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
LONDON CIRCUIT COMMERCIAL COURT
MR RICHARD SALTER QC
[2018] EWHC 3090 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2019

Before :

LORD JUSTICE HAMBLEN
LORD JUSTICE MALES
and
DAME ELIZABETH GLOSTER

- -

Between :

GAMA AVIATION (UK) LIMITED	**Respondent**
- and -	
TALEVERAS PETROLEUM TRADING DMCC	**Appellant**

- -
- -

Claudia Wilmot-Smith (instructed by **MFB Solicitors**) for the **Appellant** – written submissions only
Tim Marland and **Emily McWilliams** (instructed by **Norton Rose Fulbright LLP**) for the **Respondent**

Hearing date : 22 January 2019

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Approved Judgment

Lord Justice Males :

Introduction

1. This is an appeal by the defendant against an order made by Mr Richard Salter QC sitting as a Deputy High Court Judge in the London Circuit Commercial Court whereby he adjourned an application by the claimant for summary judgment on terms that if the defendant provided security for the claim in the sum of £1 million, the defendant would have permission to rely in response to the application on a witness statement served only a few days before the hearing, but that if the defendant failed to provide security within the time specified, judgment would be entered against it for the full sum claimed together with interest and costs.

2. The defendant did not provide the security and asserts that it is unable to do so. It contends on appeal that the judge was wrong to make the provision of such security a condition of its being entitled to rely on the witness statement and, in any event, that the sanction of judgment being entered against it in the event of failure to comply was disproportionate. It points out that the effect of the order was that if the security was not provided, judgment would be entered against it without any consideration of the merits of the claim so that it would be worse off than if the judge had refused to admit the witness statement and gone on to deal with the summary judgment application, leaving the defendant to make such submissions as it could in response to the claim without the benefit of that evidence.

3. There are, therefore, two broad issues for decision:

   (1) Was the judge wrong to make the provision of security a condition for admitting the witness statement?

   (2) Was the judge wrong to order that judgment would be entered against the defendant if the security was not provided?

4. If the judge was wrong in one or both of these respects it will be necessary to consider what order should now be made.

5. The defendant's solicitors applied to come off the record very shortly before the hearing of the appeal and that application was granted. As a result, the defendant was unrepresented at the hearing, although Mr Alex School the defendant's Senior Legal Manager attended. He requested an adjournment of the hearing in order to enable the defendant to engage solicitors. However, we decided that the hearing should proceed. We had the benefit of a detailed written skeleton argument prepared by the defendant's counsel which developed the submissions outlined above. We heard oral submissions from the claimant's counsel.

Background

6. The claimant (Gama Aviation (UK) Ltd, a company incorporated in England and the respondent to the appeal) provides aircraft management services. The defendant (Taleveras Petroleum Trading DMCC, a Dubai company and the appellant) was the lessee of a Bombardier Global 5000 aircraft.

7. On 1 March 2016 the parties entered into an Aircraft Management Agreement by which the claimant agreed to provide management services to the defendant in connection with the entry into service and the subsequent management and operation of the aircraft. The defendant agreed to pay monthly management fees totalling US $23,500 together with various other fees for the provision of personnel and to reimburse the claimant for costs and expenses incurred by it. The services which the claimant agreed to provide included predelivery services such as assisting with the certification and registration of the aircraft and reviewing maintenance records to ensure compliance with all necessary regulations, preparation of the aircraft for entry into service including supervision of refurbishment work and the provision of equipment and crew, and management services for maintenance and operation including the provision of flight crew and administrative personnel.

8. It is the claimant's case, not accepted by the defendant, that the parties agreed a monthly figure of US $60,000 for the provision of personnel.

9. In the event the period during which the claimant provided services was short lived. The claimant's case is that the aircraft entered into service on 14 March 2016, that being the date of a flight from the United States to the United Kingdom which appears to have been the only flight which the aircraft made during the period when the Agreement was in force. The defendant, however, maintains that this was merely a repositioning flight as the aircraft had been delivered at an airport in the United States and needed to be flown to this country where it was to be based, and that this did not amount to entry into service under the Agreement. The defendant accepts that the aircraft did eventually enter into service and that management fees became payable, but does not accept that this occurred before 12 April 2016, which was six weeks from the date of the Agreement.

10. On 13 June 2016 the claimant received a copy of a Grounding Notice served by Credit Suisse on the owner of the aircraft. Subsequently, on 23 December 2016, Credit Suisse served a Repossession and Grounding Notice on the owner of the aircraft which had the effect of formally terminating the Agreement. Thus the Agreement was in force for a period of just under 10 months, the aircraft was in service for two or three months depending on the status of the initial and (as it appears) only flight, and the aircraft was grounded for some six months before termination of the Agreement.

11. The claimant's case is that during the period of the Agreement it earned management fees and is entitled to be reimbursed for costs and expenses incurred in the total sum of US $1,967,977.05 but has received only US $567,638.70. Thus its claim is for the sum of US $1,400,338.35 alleged to be due under the Agreement. It says that it invoiced the defendant from time to time and provided detailed supporting documents and that there was never any challenge to its entitlement to payment. The invoices were simply ignored.

12. The defendant admits that the claimant is entitled to management fees during the period when the aircraft was in service which it says was from a date not before 12 April 2016 until receipt of the Grounding notice on 13 June 2016, together with such costs and expenses as were actually incurred and paid by the claimant during this period. However, it does not accept that the total amount to which the claimant is entitled exceeds the payments which it has received.

Procedural history

13. A letter before action dated 22 December 2018 was sent by the claimant's solicitors to the defendant demanding payment of the sum claimed. The claimant's evidence is that it was copied to Mr Igho Sanomi, a director of the defendant and the moving spirit behind the Taleveras group of companies. There was no response.

14. The claim form in this action was issued on 16 March 2018. It was served on a service agent in London nominated in the Agreement, with service deemed to have taken place on 27 March 2018. The claimant's evidence is that the claim form and Particulars of Claim were also emailed to Mr Sanomi.

15. The defendant did not acknowledge service by the due date, 10 April 2018, but the claimant's evidence is that the proceedings came to the attention of the defendant and were discussed between the Chief Executive Officer of the claimant's group and Mr Sanomi at the end of April 2018.

16. On 6 July 2018 the claimant issued an application for summary judgment which was served on the defendant on 24 July, with a hearing listed for 30 July. The claimant did not enter a default judgment, which it would have been entitled to do, presumably because such a judgment may have been difficult to enforce. Instead it sought summary judgment, an application for which the claimant needed permission pursuant to CPR 24.4(1) because the defendant had not filed an acknowledgement of service.

17. At that stage the defendant instructed solicitors who sought an adjournment of the hearing. The hearing was adjourned by consent. On 2 August 2018 the defendant acknowledged service but it did not serve any Defence. As the claimant had applied for summary judgment, it was not required to do so: CPR 24.4(2).

18. In due course the application for summary judgment was re-fixed for Friday 2 November 2018. The defendant's evidence should have been served by 7 August 2018, but its solicitors requested an extension until 17 September. That was not agreed, but the defendant took no steps to seek an extension from the court.

19. On 9 October 2018 the claimant's solicitors pointed out that the defendant had failed to serve a Defence or evidence in response to the summary judgment application and invited the defendant to consent to the application. There was no response.

20. Eventually, on 29 October 2018, i.e. on the Monday before the hearing on the Friday, the defendant issued and served an application to be permitted to rely on a witness statement of Mr Alex School, the Senior Legal Manager of the defendant. Much of the witness statement consisted of submission, contending that the claimant had not sufficiently established that it was entitled to reimbursement of expenses which it claimed to have incurred and which represented the greater part of the claim. However, it also made two factual points. The first of these was to deny that any agreement had been reached as to the amount to be paid for the provision of personnel. The second was to deny that the aircraft had entered into service on 14 March 2016 as the claimant contended, as the flight which took place on that date from the United States to the United Kingdom was merely a repositioning flight and did not amount to entry into service under the Agreement.

21. The defendant accepted that this evidence was served very late and that it needed permission to rely upon it. It sought permission to do so by way of relief from sanctions in accordance with the principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. It recognised that if it was not permitted to rely upon the witness statement, it would be unable to advance submissions based on the two factual points in the statement as these would be unsupported by any evidence to contradict that of the claimant, but maintained that it would in any event be entitled to make the remaining points in the statement by way of submission, that is to say to submit that by reason of those matters the claimant had not made good its entitlement to summary judgment.

22. The explanation for the late service of the evidence was set out in a second statement by Mr School, also dated 29 October 2018. It was that "due to an oversight" the claim did not come to Mr School's attention until after the summary judgment application was issued in July 2018. The oversight in question arose from the fact that the claimant had issued separate proceedings against two companies in the Taleveras group, both of which were served on the service agent in London, but that the service agent had failed to appreciate that there were two separate actions and had only notified the group of the other action, which was against a different company in the group under an unrelated contract. By the time when Mr School appreciated the existence of this action, he had just lost his father and was on leave in Nigeria dealing with funeral and other arrangements, and there was nobody else available to give proper instructions to the defendant's solicitors. In the event Mr School only returned to the office at the beginning of September. Thereafter attempts to collate evidence in response to the claimant's summary judgment application were hampered by the fact that relevant personnel had left the company and their emails were not available.

23. Mr School's witness statement did not address the claimant's evidence that there had been a conversation about the proceedings between the claimant's Chief Executive Officer and the defendant's director Mr Sanomi at the end of April 2018. Nor did it explain why there had been no previous challenge to the claimant's claim, either at the time when the invoices were submitted or in response to the letter before action.

24. The claimant resisted the defendant's application for permission to rely on the witness statement, contending that it came too late and that, if such permission were granted, a further adjournment of the summary judgment application would be necessary, a course which the claimant did not want. The claimant's position was that the court should proceed to hear the summary judgment application without reference to the witness statement. A witness statement by Mr Robin Springthorpe of the claimant's solicitors was served on 1 November 2018. It recited the procedural history set out above and complained that the defendant was seeking to obtain a tactical advantage by serving extensive evidence very shortly before the hearing to which it knew that the claimant would not have time to respond properly.

The hearing

25. At the outset of the hearing the parties invited the judge to deal first with the defendant's application to be allowed to rely on Mr School's witness statement. For the defendant Ms Claudia Wilmot-Smith submitted that it should be allowed to do so by reference to the *Denton* criteria but also made the point that even without the witness statement she would seek to contend that there were sufficient grounds for

refusing the claimant's application for summary judgment. She submitted that the proper course was to adjourn the summary judgment application and to give directions for the filing of a Defence, after which the claimant could renew its application for summary judgment if it still thought it was appropriate to do so.

26. Towards the end of Ms Wilmot-Smith's submissions the judge raised the possibility that if he were to allow the defendant to rely on the witness statement, the claimant would need an adjournment which should be conditional on the defendant bringing the sum claimed into court. Ms Wilmot-Smith indicated that she would have to take instructions about that.

27. Ms Emily McWilliams then made her submissions for the claimant. She submitted that the *Denton* criteria for relief from sanctions were not satisfied and that permission to rely on the witness statement should be refused. She relied on the need for an adjournment as a reason why permission should be refused. When asked by the judge what she would say about the possibility of an adjournment on terms that all or part of the sum claimed be brought into court, she did not positively invite him to take this course but said that if he did so, it should be on terms that all and not merely part of the sum was secured and that with clients in the United States it was not possible to take immediate further instructions. Ms Wilmot-Smith then replied and the judge gave judgment on the application without hearing any submissions on the summary judgment application itself.

The judgment

28. The judge began his judgment by acknowledging that it would be unfair to the claimant to permit Mr School's witness statement to be relied on without giving the claimant a reasonable opportunity of putting in responsive evidence. It followed that if he were to grant the defendant's application, an adjournment of the summary judgment application would be necessary.

29. He then concluded, applying the first two *Denton* criteria, that the late service of the witness statement was serious and that the explanation provided was unsatisfactory, in particular because there was no explanation why somebody other than Mr School could not have dealt with the case and because, even on Mr School's evidence, he had been back in the office since September and should have had time to provide evidence much sooner. After dealing with the various points made by Ms Wilmot-Smith as to why, nevertheless, the witness statement should be admitted, he stated his conclusion as follows:

> "17. As I have said, if I allow in Mr School's witness statement, an adjournment is inevitable. The defendant's application is therefore, in effect, an application (*inter alia*) for an adjournment. A reasonable inference from the defendant's dilatory conduct in relation to this action, and the unsatisfactory nature of Mr School's explanation for the delay, would be that the defendant is simply playing for time. It would be open to me, in those circumstances, simply to refuse the defendant's application.
>
> 18. However, not without some hesitation, I have concluded that this is a case in which I can do pragmatic justice by acceding to the defendant's application, letting in Mr School's witness statement and consequently adjourning the

> claimant's application for summary judgment, provided that I do so on stringent conditions.
>
> 19. The condition which I propose to impose is that the defendant should bring the sum of £1 million into court or otherwise give security in that sum within 21 days, to abide the outcome of this action or further order. That is less than the full amount claimed but is nevertheless a substantial sum. If the defendant complies with that condition, it will show (contrary to the impression which it has so far given) that it is genuine in its defence, and is not simply playing for time. …
>
> 20. If, however, the defendant does not comply, it seems to me that there should be judgment against it for the full amount claimed and costs. The defendant has put in no evidence of impecuniosity or that it would be difficult or impossible for it to comply with the condition that I have referred to. That is so even though the defendant has known since July that it is facing a summary judgment application, in relation to which it must have realised that conditional permission to defend was a real possibility (and therefore that it was necessary for it to put in full and frank evidence if it wished [to] rely any lack of resources as an argument against the imposition of such a condition).
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> 21. In those circumstances, the defendant's deliberate decision not to comply with the condition referred to above would strongly reinforce the inference that this application has been simply another attempt by the defendant to delay the inevitable. It would be wrong for that attempt to succeed without consequences, and both unjust and contrary to the overriding objective for the court's time to be further wasted."

30. After judgment had been concluded Ms Wilmot-Smith (who had in the meanwhile been seeking further instructions) told the judge that she had now received instructions that the defendant was unable to comply with the payment condition which he had imposed. She began to submit that the summary judgment application should therefore go ahead without reliance on Mr School's witness statement, but the judge cut her off, saying that he had given her an opportunity to make submissions about this and had now made his order.

31. The judge decided to reserve the costs of the summary judgment application and of the application to adduce Mr School's witness statement to the judge hearing the adjourned application. As a result he did not carry out any summary assessment of those costs or of the costs thrown away as a result of the adjournment. He ordered the defendant to serve its Defence by 30 November 2018.

32. The judge described the sum of £1 million which he ordered the defendant to provide as being "less than the full amount claimed but … nevertheless a substantial sum". It was in fact, depending on the precise exchange rate, over 90 per cent of the principal sum claimed. It will be observed that the judge made this order, not because of any view of the merits of the claim, as to which he had not heard any submissions, but as a way of enabling the defendant to demonstrate that it was "genuine in its defence and … not simply playing for time".

33. Following the hearing, on 9 November 2018 (and thus earlier than the judge had ordered) the defendant served a Defence which, in essence, marshalled the points already taken in the witness statement in a formal pleading.

The appeal and application to adduce further evidence

34. The defendant now appeals with the permission of Longmore LJ on the grounds (in summary – the arguments were fully developed in the skeleton argument prepared by Ms Wilmot-Smith before the defendant's solicitors came off the record) that it was wrong in principle to require the defendant, as a condition of being able to defend the claim, to make a payment which it was unable to make; that the defendant had not had a reasonable opportunity to obtain evidence about its inability to make the payment; that the provision of security for almost the full amount of the claim was not a reasonable or proportionate response to the defendant's delay in serving evidence; and that the sanction of judgment being entered in the event that the security was not provided was unduly severe and indeed more severe than a simple refusal to admit the witness statement would have been. It seeks to adduce evidence on appeal to demonstrate that it is unable to make the payment.

35. The evidence which the defendant seeks to adduce consists of a third witness statement by Mr School dated 28 November 2018 together with a statement by Mr Rashid Bhatti. Mr School reported that the defendant had done very little business since 2016, that it was having "cash flow issues", that it "does not have the funds at the moment to make the payment", and that it had found it difficult to make funds available for the payment of its own solicitors. He said that the defendant had "been trying to obtain funds" but that "I am informed by [the defendant's] general manager for accounts and audit, Rashid Bhatti, it has not been possible to obtain money to pay into court".

36. Mr Bhatti's evidence is that:

> "5. … [the defendant] does not have £1 million available to pay into court. [Its] business is struggling, and it does not have this sort of money. The company is currently undergoing its annual audit process.
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> 6. Given the consequence of non-payment, I did look into whether it would be possible to raise the funds.
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> (1) [The defendant] was expecting some payments to come through.
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> 7. As things stand, therefore, [the defendant] has struggled to raise sufficient funds to instruct solicitors to deal with this claim, let alone make any payment into court. It will not be able to pay £1 million by this Friday 30 November."

37. The claimant resists the appeal and supports the judge's reasoning as a discretionary case management decision, but contends in the alternative that even if the sanction of judgment being entered was too severe, (1) permission to rely on Mr School's statement should be refused if the defendant failed to comply with the payment condition, or (2) such permission should be refused and the summary judgment

application should go ahead without reference to the witness statement or the Defence which has now been served.

Some preliminary matters

38. It may be useful to begin by identifying some preliminary matters.

39. First, it was common ground below and before us that in order to adduce Mr School's witness statement the defendant needed to obtain relief against sanctions in accordance with the principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. I will assume, without deciding, that this was correct (but see *Tenaga Nasional Bhd v Frazer-Nash Research Ltd* [2018] EWHC 2970 (QB) at [34] and [35], a recent case to which we were not referred). There was no argument to the contrary and the assumption does not affect the outcome of this appeal. On that basis the judge concluded, applying the first two *Denton* criteria, that the late service of Mr School's witness statement was a serious failure to comply with the rules for which there was no sufficient explanation. Others may have taken a different view as to the seriousness of this failure, but it is unnecessary to decide whether this was an exercise of judgment with which this court would not interfere as there was no challenge to this conclusion on appeal.

40. Second, it would on this basis have been open to the judge to refuse to admit Mr School's witness statement. That would have been a discretionary case management decision with which this court would not generally interfere. It is, however, understandable that the judge preferred to admit the statement. In general, if a court is asked to give summary judgment it is desirable that the defendant should have an opportunity to put its case before the court provided that this can be done without injustice to the claimant.

41. Third, if the judge had refused to admit the witness statement, he would have had to go on to determine the summary judgment application. The defendant would then have been entitled to make submissions (albeit without being able to rely on any facts contained only in Mr School's witness statement) as to why the test for summary judgment was not satisfied. In the event that stage was never reached, so that there is no decision by the court below (even in the absence of Mr School's witness statement) whether or not the claimant was entitled to summary judgment. Nor is there any decision that it is "improbable" that the defence will succeed.

Conditional orders requiring payment into court or equivalent security – some principles

42. As the Rules make clear, on an application for summary judgment the court may make a conditional order (CPR 24.6). A typical condition will be to require the defendant to pay a sum of money into court or to provide security in some other form. Such an order may be made, as CPR 24 PD para 4 states, "where it appears to the court possible that a … defence may succeed but improbable that it will do so". It is not necessary to show that a defence is "shadowy" or "dubious in its *bona fides*" (expressions which were sometimes used in considering whether to give conditional leave to defend under the pre-CPR regime), although if a defence is shadowy or of doubtful good faith that will no doubt be a relevant consideration in exercising the

power to make a conditional order and deciding the amount of any security which should be ordered.

43. It follows that there is a category of case where the defendant may have a real prospect of success, but where success is nevertheless improbable and a conditional order for the provision of security may be made. This is the typical case where a conditional order may be made requiring the provision of security for the full sum claimed or something approaching that sum.

44. That being so, there would appear at first sight to be force in the judge's view that a defendant to an application for summary judgment should realise that a conditional order may be made and should therefore adduce evidence in the event that it wishes to rely on lack of resources as an argument against the imposition of a payment condition. However, the authorities make clear that this is not the position which the courts have adopted. The following principles are well established.

45. First, at any rate in a case where the defendant has a real prospect of successfully defending the claim, the court must not impose a condition requiring payment into court or the provision of security with which it is likely to be impossible for the defendant to comply. As Lord Diplock explained in *MV Yorke Motors v Edwards* [1982] 1 WLR 444, "that would be a wrongful exercise of discretion, because it would be tantamount to giving judgment for the plaintiff notwithstanding the court's opinion that there was an issue or question in dispute which ought to be tried". *Yorke Motors* was decided under the pre-CPR Rules but the principle was reaffirmed by the Supreme Court in *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2017] UKSC 57, [2017] 1 WLR 3014 at [12].

46. Second, the burden is on the defendant to establish on the balance of probabilities that it would be unable to comply with a condition requiring payment into court or the provision of equivalent security: *Goldtrail* at [15].

47. Third, in order to discharge that burden a defendant must show, not only that it does not itself have the necessary funds, but that no such funds would be made available to it, whether (in the case of a corporate defendant) by its owner or (in any case) by some other closely associated person. This third principle derives from the well known observation of Brandon LJ in this court in the *Yorke Motors* case which was approved in the House of Lords and re-affirmed in *Goldtrail*:

> "The fact that a man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."

48. It is important in the case of a corporate defendant to keep well in mind that the question is not whether the company's shareholders can raise the money but whether the defendant company has established that funds to make the payment will not be made available to it by its beneficial owners. As Lord Wilson explained giving the majority judgment in *Goldtrail* at [23]:

> "In this context the criterion is: Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether

> by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?"

49. Lord Wilson went on at [24] to explain the kind of evidence which the court would expect to receive when a company seeks to discharge this burden:

> "In cases, therefore, in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position; and by reference to all aspects of its relationship with its owner, including, obviously, the extent to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms."

50. Although Lord Clarke and Lord Carnwath dissented on the facts, there was so far as I can see no disagreement about the applicable principles.

51. Fourth, and despite the fact that the Rules expressly contemplate the possibility of a payment condition being imposed, it is not incumbent on a defendant to a summary judgment application to adduce evidence about the resources available to it, at any rate in a case where no prior notice has been given that the claimant will be seeking a conditional order.

52. It was so held in *Anglo-Eastern Trust Ltd v Kermanshahchi* [2002] EWCA Civ 198 where the claimant applied for summary judgment but did not explicitly seek a conditional order, although it did seek in the alternative an interim payment. The judge concluded that there was a real prospect of the defence succeeding, but that it was improbable that it would do so. He made a conditional order for the sum claimed to be paid into court within 28 days, failing which the defence would be struck out and the claimant would be entitled to immediate judgment. The defendant appealed, contending that this order should not have been made as its effect would be to stifle the defence. No evidence of his means had been produced at the summary judgment hearing before the judge. This court held that the judge had been entitled to conclude that it was improbable that the defence would succeed, but that it was wrong to require the defendant to make a payment which he could not make. It held that the defendant had not been at fault in failing to adduce evidence of his means before the judge in circumstances where there had been no prior notice that such a condition would be sought and that justice required that permission be given to adduce such evidence on appeal. The evidence adduced made good the assertion that the defendant could not comply with the condition, although he could raise a much lesser sum. Accordingly the appeal was allowed, varying the condition to require the defendant to pay into court only the lesser sum which he was able to raise.

53. Brooke LJ said:

> "68. It has always been a feature of the summary judgment procedure that the plaintiff/claimant is unlikely to want to refer to the possibility of a conditional order being made, and the defendant is unlikely, unless pressed, to want to refer to any lack of means when asserting that its defence has a real prospect of

> success. The former would regard any reference to a conditional order as a sign of weakness because its desire is to persuade the court that the defendant has no real defence. The latter is unlikely to wish to parade its lack of means when contesting the merits of the claim, because this might encourage the court to look more critically into the merits of the defence it wishes to put forward in response to a claim which it knows it cannot pay. In these circumstances a court should not as a general rule make an order of the type made by Judge Hegarty in the absence of any evidence about the defendant's means unless it is satisfied that the defendant has been given appropriate prior notice, which may be given informally by letter (as opposed to a formal application), to the effect that if the summary judgment application fails the claimant will be seeking a conditional order along the lines set out in the letter. The defendant can then prepare a witness statement as to its means, for production at the stage of the proceedings when the court says it intends to make a conditional order.
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> 69. It was suggested in the course of argument that CPR 23.6(i) required A-ET to apply for a conditional order, as an alternative to the summary judgment order it was seeking, in its original application notice. I do not consider that this is a correct interpretation of that rule, which provides that 'an application must state what order the applicant is seeking'. The order the applicant is seeking in these circumstances is an order for summary judgment. It is only when that application fails, so that the applicant is not given what it seeks, that the court may consider making a conditional order in the course of its case management directions.
>
> 70. It would be wrong for this court to prescribe any particular procedure which might avoid the problem that arose in this case, given that the rules and the practice directions are silent and circumstances may vary so much from case to case. What is important is that if a claimant is seeking a conditional order that is out of the ordinary if a summary judgment application fails – and an order that a defendant should pay £1 million into court falls into that category – the judge should not allow any order of that kind to be perfected immediately if the defendant seeks an opportunity to place evidence before him to the effect that the order will stifle its defence completely because it does not have the means to pay."

54. Fifth, the court's power to make a conditional order on a summary judgment application is not limited to a case where it is improbable that the defence will succeed. Such an order may be appropriate in other circumstances, for example (and without being exhaustive) if there is a history of failures to comply with orders of the court or there is a real doubt whether the party in question is conducting the litigation in good faith. However, the court needs to exercise caution before making a conditional order requiring a defendant who may have a good defence to provide security for all or most of the sum claimed as a condition of being allowed to defend.

55. A related issue arose in *Huscroft v P & O Ferries Ltd* [2010] EWCA Civ 1483, [2011] 1 WLR 939 where the question was whether a conditional order should be made requiring security for costs to be provided by the claimant in circumstances where the defendant was unable to satisfy the requirements for such an order set out in CPR 25. This court held that in principle there were circumstances in which such an order could be made, but that it was important that it should not be sought as a way of circumventing the defendant's inability to obtain an order for security for costs

under CPR 25. Moore-Bick LJ emphasised at [18] that it was important for the court "to focus attention on whether the condition (and any supporting sanction) is a proper price for the party to pay for the relief being granted". He continued at [19]:

> "… before exercising the power given by rule 3.1(3) the court should identify the purpose of imposing a condition and satisfy itself that the condition it has in mind represents a proportionate and effective means of achieving that purpose having regard to the order to which it is to be attached."

56. The same approach is necessary when the court is considering the imposition of a condition requiring a defendant to make a payment into court of some or all of the sum claimed. I would accept that there will be some circumstances in which such an order may be justified, but it is always necessary to identify the purpose of imposing such a condition and to ensure that the condition (including any sanction for non-compliance) represents a proportionate and effective means of achieving that purpose. Moreover, a conditional order requiring payment of something close to the full sum claimed into court should not be seen as a way of circumventing the criteria for making such an order in CPR 24 PD para 4 (i.e. that it appears improbable that a defence will succeed) or for that matter for making a freezing order (which, although not strictly security, represents in some ways the next best thing).

Was the judge wrong to make the provision of security a condition for admitting the witness statement? – impecuniosity and stifling

57. In the present case the claimant had given no prior notice that it would seek a conditional order, either as an alternative to its summary judgment application or as a condition of the defendant being allowed to rely on the witness statement of Mr School. That was not in fact the claimant's position. Rather its position was that the statement should not be admitted. The suggestion that a conditional order might be appropriate came from the judge in the course of the hearing. Although it is fair to say that it would not have been difficult for those acting for the defendant to predict that such a suggestion might be canvassed, it would not be appropriate in the light of *Anglo-Eastern Trust Ltd v Kermanshahchi* to criticise the defendant for not having addressed that possibility in its evidence served prior to the hearing.

58. Once the suggestion was made, however, it was incumbent on the judge to give the defendant a reasonable opportunity to explain (if it wished to do so) why it would be unable to comply with such a condition. Unfortunately the judge did not do so. It was not reasonable to expect Ms Wilmot-Smith to be pre-armed with evidence to discharge the burden upon the defendant immediately the point was raised. It is apparent that she sought and obtained prompt instructions as best she could and that those instructions were to the effect that the defendant was unable to make the payment and wished to have an opportunity to put appropriate evidence before the court. However, having already given judgment, the judge declined to give the defendant that opportunity.

59. In those circumstances, where judgment had been given but no order had been sealed, there were two possible courses which the judge could have taken. He could have taken the course for which Ms Wilmot-Smith was contending, that is to say to proceed to hear the summary judgment application without admitting Mr School's witness statement. Alternatively, if he wished to maintain his view that the

appropriate order was to admit the witness statement and adjourn the summary judgment application on conditions, he should have given the defendant an opportunity to adduce evidence of the resources available to it to comply with the proposed condition. Had he taken this latter course, it would have been reasonable to require the defendant to adduce such evidence in fairly short order, not only out of fairness to the claimant but also because while a defendant is not expected to adduce such evidence in advance of a summary judgment application where there is no notice that a conditional order will be sought, it is reasonable to expect it to be in a position to do so promptly if (as is not uncommon) such a possibility arises at the hearing. An adjournment would have been necessary, which would mean some delay, but this need not have been prolonged.

60. In the event the judge took neither of these courses. In my judgment his failure to do so was an error of principle.

Admission of fresh evidence on appeal

61. In those circumstances, just as in *Anglo-Eastern Trust Ltd v Kermanshahchi*, I would admit the evidence as to the resources available to the defendant set out in Mr School's third witness statement and in the statement by Mr Bhatti. That represents in effect the evidence which the defendant would have adduced before the judge if given the opportunity to do so. As the defendant was not given that opportunity, fairness requires that the evidence should be admitted on appeal.

62. That said, however, the evidence (which I have set out above) falls far short of what is required to discharge the burden on the defendant to establish that funds would not be made available to it, whether by its owner or by some other closely associated person, in order to enable it to satisfy a condition of payment. It consists of nothing more than assertion as to inability to make the payment. The court has been provided with no material, such as the defendant's latest accounts (despite the reference to those accounts being audited), with which to assess "the underlying realities of the company's financial position". There is no evidence from the owner of the company. There is no evidence at all about the defendant's relationship with its owner, including the extent which he is supporting and has supported the defendant financially. There is no evidence the position of other companies in the Taleveras group. Mr Bhatti refers to having "looked into" whether it would be possible to raise the money, but gives no detail of any efforts made in this regard, saying only that it "was expecting some payment to come through". What these payments were and why they did not come through (if that is the case) is not explained. Moreover, although Mr Bhatti asserts that the defendant was unable to pay £1 million by the deadline of 30 November 2018, it is conspicuous that he does not say, let alone provide a proper explanation, that this sum could not be paid given further time or that it would be impossible for the defendant to raise some lesser sum.

63. In effect the court is being asked to accept the defendant's case at face value, which is precisely what Lord Wilson said in *Goldtrail* at [24] that it should not do.

64. It follows that, if the judge had allowed the defendant an opportunity to adduce the evidence which it has now adduced, it would have been open to him to conclude (and I would conclude) that the defendant had failed to show that making a conditional order requiring a payment into court would have the effect of stifling its defence of

the action. That does not mean that such an order was appropriate, but it does mean that the defendant's objection to the order based on impecuniosity and stifling of the defence is ill founded.

65. I do not regard the fact that the defendant has apparently failed to pay its solicitors' fees as taking this issue any further. That is consistent with a lack of resources, but that need not be the only explanation. In this regard I have ignored the witness statement by the defendant's solicitors applying to come off the record. Somewhat surprisingly and unusually (see the note at para 42.3.4 of the White Book), this was provided by the defendant's solicitors to the claimant's solicitors, who provided it to us, but I have to say that I doubt whether this was done with the defendant's authority and it would not in my judgment be fair to have regard to it.

Was the judge wrong to make the provision of security a condition for admitting the witness statement? – purpose and proportionality

66. It would still be necessary, however, for the court to consider two matters. First, it would need to identify the purpose of imposing such a condition. The judge did this, saying that it was to enable the defendant to demonstrate that it was "genuine in its defence and … not simply playing for time". It is apparent from the paragraphs of his judgment set out above that the judge formed (at the very least) a strong suspicion that the defendant was "simply playing for time", that the application to admit the witness statement was "simply another attempt by the defendant to delay the inevitable", and that it was wasting the court's time. These were strong and repeated statements, giving the impression that the judge had formed a clear view of the merits adverse to the defendant.

67. There are in my judgment two problems with this approach. The first is that it was not necessary for this purpose to require the defendant to pay into court, or provide security for, what was in effect over 90 per cent of the sum claimed. A lesser payment would have enabled the defendant to demonstrate its good faith to the extent that this was necessary. To require payment into court of something approaching the full sum claimed was in my judgment disproportionate.

68. Second and more fundamentally, however, it is difficult to see how the judge could fairly conclude that the defendant was "simply playing for time" or attempting "to delay the inevitable" when the defendant had, albeit belatedly, set out its case on the merits and the judge had not yet heard submissions about it. Without giving the defendant an opportunity to address the merits of the summary judgment application, the judge was not in a position to reach a view that judgment for the claimant was "inevitable" or that the defendant was "playing for time". At most he might conclude that this was a possibility, but it would be necessary to set against that the fact that the defendant had now set out detailed reasons in the witness statement and in Ms Wilmot-Smith's skeleton argument to say why it had at least a real prospect of successfully defending the claim.

69. For these reasons I consider that the judge was wrong to impose the condition of payment into court. He lost sight, in my judgment, of the caution which the court must exercise before making such an order.

Was the judge wrong to order that judgment would be entered against the defendant if the security was not provided?

70. Second, and on the assumption that a payment condition was appropriate, the court would need to satisfy itself of the appropriateness of the proposed sanction for non-compliance, in particular that it represented a proportionate and effective means of achieving the purpose in question. Typically, the nature of the sanction will be obvious. An order giving permission to rely on a witness statement conditional on making a payment into court contains its own sanction. If the payment is not made, there will be no permission to rely on the statement. In the present case, however, the judge went further, allowing the claimant to enter judgment if the payment was not made. He did so at a stage when he had not heard submissions on the merits of the summary judgment application and it was therefore not open to him to reach any conclusion about it. Nor was it suggested that this was a case where the claimant would be entitled to a freezing order.

71. The effect of this further sanction was that the defendant was worse off than if it had simply been refused permission to rely on the witness statement. In that event it would have been able to put forward the arguments which did not depend on any new factual evidence and which, as it happens, were set out in the witness statement. I say nothing as to whether those arguments would have been successful in defeating the summary judgment application, but they were arguments which the defendant was entitled to have the court consider. As it was, if the defendant did not make the payment, judgment would be entered against it notwithstanding the fact that it might have a good defence to the claim.

72. In these circumstances the sanction imposed by the judge was disproportionate and for this reason also his order cannot stand.

73. It is, moreover, relevant to consider briefly the nature of any judgment which would have been entered as a result of the defendant's failure to make the payment into court or provide security. It would not be a judgment based on a consideration of the merits, which is what the claimant was seeking in order to avoid potential enforcement difficulties, but rather something in the nature of a default judgment, which the claimant had indicated by making its summary judgment application that it did not want. Although this is not decisive as the claimant could always change its mind, it does not appear that this point was considered at the hearing. It is a further indication that something went wrong.

What order should this court now make?

74. As the order made by the judge cannot stand, it is for this court to determine what order should now be made.

75. I have concluded that the making of a conditional order requiring a substantial payment as a condition of reliance on the factual matters in the witness statement would not have the effect of stifling the defence of the action, but that in circumstances where the merits of the summary judgment application are for future determination, it is not appropriate to make a conditional order of the kind made by the judge, even in some lesser but still substantial sum. In the end this is simply a case where the defendant served late evidence which required an adjournment of the

hearing. There is no reason to suppose that an adjournment of what was no more than a two hour hearing need have been particularly lengthy. Once the judge decided to admit the evidence, justice would have been served if the judge had ordered the defendant to pay the costs thrown away as a result of the adjournment. He could have assessed those costs summarily and made prompt payment a condition of the defendant's entitlement to rely on the factual matters set out in the witness statement.

76. That is the order which I would be inclined to make on this appeal. Unfortunately, however, the judge did not assess the costs thrown away as a result of the adjournment and we do not have the material with which to do so. We have been provided with the claimant's schedule of costs for the summary judgment application which shows that its total costs incurred on the application amounted to some £43,000. Many of those costs, however, will not be wasted as a result of the adjournment as (for example) such matters as the preparation of evidence and of a skeleton argument will not need to be repeated. Any attempt by us to assess the wasted costs would be little more than guesswork although, in any event, the figure will be modest.

Disposal

77. I have throughout this judgment kept well in mind that the order appealed from is a discretionary case management decision with which this court should not interfere in the absence of some error of law or principle by the judge. In my judgment, however, there was such an error for the reasons which I have explained.

78. In the result I would allow the appeal by setting aside that part of the judge's order which required the defendant to pay £1 million into court or to provide security in a like sum and provided that if the defendant failed to do so, there would be judgment for the claimant. I would substitute an order that the defendant has permission to rely on the witness statement of Mr School. The remaining case management directions given by the judge will stand although the claimant will now need longer to file any responsive evidence. Such evidence should be served within 21 days after hand down of this judgment. I would order that the defendant pay the claimant's costs thrown away as a result of the adjournment, but in the absence of any material with which to assess those costs I would not make this a condition of the defendant's reliance on the witness statement. For the avoidance of doubt and because this was canvassed at the hearing, I see no good reason why the defendant should not be permitted to refer to the Defence which it has served.

Dame Elizabeth Gloster DBE :

79. I agree.

Lord Justice Hamblen :

80. I also agree.