Neutral Citation Number: [2021] EWCA Civ 1408

Case No: B3/2021/1147

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
HHJ BIRD (SITTING AS A JUDGE OF THE HIGH COURT)
H90MA035

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 September 2021

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ELISABETH LAING

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Between:

BUTTAR CONSTRUCTION LIMITED	**Appellant/ 4th Defendant**
- and –	
ARSHDEEP	**Respondent/ Claimant**

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Andrew McLaughlin (instructed by **Plexus Law**) for the **Appellant**
Michael Lemmy (instructed by **Law Together LLP**) for the **Respondent**

Hearing date: 16 September 2021

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Approved Judgment

Lord Justice Stuart-Smith:

Introduction

1. This is an appeal against the decision of HHJ Bird, sitting as a Judge of the High Court, by which he ordered the Appellant ["Buttar"] to make an interim payment of £150,000 to the Claimant. The appeal raises issues about the proper construction of CPR 25.7(1)(e) and wider questions about the construction of CPR 25.7(1).

2. On 21 August 2020 the Claimant was working as a labourer on a building site in Swindon when he suffered catastrophic injuries. He was employed by the second Defendant ["YKS"] who were engaged by Buttar as independent brickwork contractors. The first and third Defendants are the individuals who control YKS and Buttar respectively. By the time of the application to the Court below, no interim payment was sought from them; the application was pursued against YKS and Buttar.

3. The Claimant was working during the summer vacation, as he was entitled to do by the terms of his Student Visa. It was either the second or third day of his employment. YKS had carried out a risk assessment for the work they were undertaking and provided a method statement dealing with how the work should proceed. The method statement required bricks and blockwork to be stored on secured platforms. That did not happen. Instead, bricks and blocks were stored on sheets of hardboard that were spread over joists above head height for those working below. Acting on instruction from YKS, the Claimant was handing up bricks and blocks to a fellow worker, who was stacking them while standing on the joists. The accident happened when the joists and the walls supporting them collapsed. Subject to one point to which I will return, the exact mechanism of failure does not matter. What matters is that the joists, wall, bricks and blocks collapsed and fell and, in so doing, crushed the claimant causing him to suffer injuries of maximum severity. It is not disputed that he is in urgent need of rehabilitation. For reasons that do not affect the outcome of this appeal, he is at present not entitled to effective rehabilitation at public expense. Hence, if the Claimant can obtain one, there is a compelling need for an interim payment to enable him to fund an appropriate rehabilitation package himself.

The proceedings

4. These proceedings were issued on 5 February 2021. The claim is brought in negligence against each of the four Defendants. The claim against YKS is founded on the duties owed by YKS to the Claimant as his employer. In briefest outline, it is alleged that YKS failed to provide a safe place of work or system of working. The Claimant alleges multiple breaches of the relevant regulations as evidence of negligence on the part of YKS, it being common ground that breaches of the regulations do not of themselves give rise to any statutory cause of action. The Claimant alleges that Buttar was negligent in causing or permitting the bricks and blocks to be stacked as and where they were without there being any adequate assessment of the strength and stability of the joists and supporting walls. He also alleges that Buttar were negligent in causing or permitting him to stand in an unsafe place and in failing to provide him with a safe place of work. Once again, multiple breaches of relevant regulations are cited as evidence that Buttar, as main contractor on site, was negligent in and about the construction of the works and, specifically the stacking of bricks and blocks on the joists as happened.

5. YKS's defence admits that the Claimant was working at its direction and under its control, though it avers that he was engaged as a self-employed labourer. That distinction may not matter as it admits it owed a duty of care to the Claimant. It asserts that it had no responsibility for the erection of the timber framework of the building and that the frames (including the joists) had been erected by the third Defendant and/or Buttar. It denies negligence and expressly denies that the joists were overloaded. On the contrary, it submits that the use of first floor joists as a loading platform was a safe and accepted method of temporary storage during the erection of brickwork and that Buttar would have known that to be the case; that there was nothing to indicate to YKS that the joists were faulty; and that the joists had (or should have had) additional support from the existing brickwork. On that basis, it characterises the collapse as "an unforeseeable event for which liability is denied." For good measure, it adopts the allegations of negligence made by the Claimant against Buttar.

6. Buttar admits that it is a construction company and that it was at all material times the principal contractor on the site. It denies that it owed any relevant duty of care to the Claimant, he being an employee of Buttar's independent sub-contractor. It relies upon express terms of the contract between it and YKS that YKS would build the walls with reasonable skill and care including in relation to health and safety; and that bricks and blocks would be stacked securely on specific loading-out platforms at convenient locations, which would not be overloaded. It denies having knowledge of the means or position adopted by YKS for storing bricks and denies that it (Buttar) had stored or stacked the bricks in that place or way. It asserts that the joists were bought from a reputable supplier, that they were installed by another independent contractor, and that there was no evidence that any of them were substandard (if, which is denied, they were). On this basis, Buttar asserts that it did not create the danger, and that it neither had knowledge of any danger nor should have done. It adopts the allegations of negligence made by the claimant against YKS. In briefest outline, it asserts that YKS should have stacked the bricks and blocks as it had said it would do by its risk assessment; and that YKS created the risk and danger by stacking the bricks and blocks as they did and, if it was a factor, by their manner of constructing the existing wall.

CPR 25.7: the applicable principles

7. CPR 25.7, so far as material, provides:

> "(1) The court may only make an order for an interim payment where any of the following conditions are satisfied –
>
> (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
>
> (b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;
>
> (c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an

order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;

(d) …

(e) in a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied –

(i) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which); and

(ii) all the defendants are either –

(a) a defendant that is insured in respect of the claim;

(b) a defendant whose liability will be met by an insurer under section 151 of the Road Traffic Act 1988 or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or

(c) a defendant that is a public body.

… ."

8. In *HMRC v GKN* [2012] EWCA Civ 57 at [32]-[39] Aikens LJ (with whom Ward and Lewison LJJ agreed) gave guidance on the proper approach to be adopted to the conditions set out in CPR 25.7(1)(c), including the following:

> "33. [I]t is obvious that the claimant seeking the Interim Payment has the burden of satisfying the court that the necessary conditions have been fulfilled for it to consider exercising the power to grant an Interim Payment order. An Interim Payment order is one that is obtained in civil proceedings. Whatever conditions have to be satisfied must be to the usual standard of proof in civil proceedings unless there is an express indication in a statute or rule of court to the contrary. Here there is none. Therefore the claimant has to satisfy the court that the requisite conditions have been fulfilled to the civil standard, which is upon the balance of probabilities. Since the House of Lords' decision in *Re H* it is well established that there is only one civil standard of proof on a balance of probabilities. In the case of an application for an Interim Payment order under CPR Pt 25.7(1)(c), of course, the claimant has to satisfy the court on a balance of probabilities about an event that has not, in fact, occurred; that is, that if the claim went to trial, he would obtain judgment (and for a substantial amount of money).
>
> …

> 36. That leads on to the next and more important question: of what does the claimant have to satisfy the court? To which the answer is: that if the claim went to trial, the claimant would obtain judgment for a substantial amount of money from this defendant. Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the Interim Payment application under paragraph (c) has to do is to put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant?
>
> …
>
> 38. The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the claimant "would obtain judgment for a substantial amount of money" ? In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an Interim Payment, the claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an Interim Payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the claimant has, in fact, succeeded. … The court must be satisfied (to the standard of a balance of probabilities) that the claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was "likely" that the claimant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money."

9. With one qualification I respectfully endorse this summary of applicable principle. The only qualification is that, in considering the terms of the rule itself, the condition is (as Aikens LJ said in both [36] and [38] of *HMRC*) that the claimant would obtain *judgment* for a substantial amount of money from this defendant if the case went to trial. The rule itself does not require, as one of the pre-conditions for the exercise of the Judge's discretion, that the Judge must also be satisfied that the judgment would result in the payment of the ordered interim payment. The prospect of *payment* may, as I shall outline below, be a material consideration for the Judge when exercising their discretion; but it is not included in the rule as a pre-condition that must be satisfied before the discretion can be exercised. What is included in the rule is the requirement under sub-paragraph (1)(e)(ii) that all the defendants are either (a) a defendant that is

insured in respect of the claim, (b) a defendant whose liability will be met under s. 151 or an insurer concerned under the MIB Agreement or the MIB itself, or (c) a defendant that is a public body.

10. Buttar relies upon dicta of Griffiths LJ (with whom Stephen Brown LJ agreed) in *O'Driscoll v Sleigh* (1984) WL 978567. *O'Driscoll* was a decision in relation to RSC O. 29.11 which, so far as material read:

> "(1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied –
>
> (a) that the defendant against whom the order is sought (in this paragraph referred to as 'the respondent') has admitted liability for the plaintiff's damages, or
>
> (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or
>
> (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,
>
> the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.
>
> (2) No order shall be made under paragraph (1) in an action for personal injuries if it appears to the Court that the defendant is not a person falling within one of the following categories, namely –
>
> (a) a person who is insured in respect of the plaintiff's claim
>
> (b) a public authority; or
>
> (c) a person whose means and resources are such as to enable him to make the interim payment"

11. There are clear similarities between the provisions of RSC O. 29 r.11 and CPR 25.7(1). There are also clear and material differences. Most obvious amongst the differences is that CPR 25.7(1)(c) and (e) change, amplify and clarify what was previously the ambit of RSC O.29 r. 11(1)(c) and (2). Previously, the Court's discretion could be exercised under RSC O.29 r. 11(1)(c) to make an order against the respondent (whether a sole defendant or one of two or more defendants) if the plaintiff would obtain judgment for substantial damages against the respondent if the case went to trial (subject to paragraph 2 in the case of actions for personal injuries). Now there are two separate categories of respondent defendant against whom an order may be made: first,

under CPR 25.7(1)(c), a defendant whom the court is satisfied that the claimant would obtain judgment for a substantial amount (whether or not that respondent defendant is the only defendant or one of a number of defendants to the claim); and, second, under CPR 25.7(1)(e), a defendant who is one of two or more defendants to the claim, where the court is satisfied that the claimant would obtain judgment for a substantial sum of money against at least one of the defendants (subject to the requirements of paragraph (1)(e)(ii) in all cases, not just personal injury actions).

12. In *O'Driscoll*, Griffiths LJ said of RSC O.29 r.11(2):

> "I read the purpose of that sub-rule as making provision for interim payments only to be ordered where it is likely that the order will be met. (a) refers to a person who is insured in respect of the plaintiff's claim. If there is an insurance company standing behind the defendant, it can be assumed that the insurers will meet the interim payment. (b) If it is a public authority, the same assumption can be made, and (c) if the person has the means and resources to enable him to make the interim payment, again one can assume that it will be met. Its obvious purpose is to ensure that costs and time are not wasted in making applications for interim payments which, however meritorious, have no realistic likelihood of being met."

13. Turning to the equivalent provisions of CPR 25.7(1)(e)(ii), I would accept that a purpose of that sub-paragraph is to ensure that defendant against whom an order for an interim payment is made will have the resources to comply with the order. Whether a respondent or, more accurately, a respondent's insurers will comply with the order is a different question.

14. On a literal reading, CPR 25.7(1)(e) requires that all defendants to the claim (and not just defendants from whom an interim payment is sought) should satisfy one of the requirements of sub-paragraph (e)(ii). However, in *Berry v Ashtead Plant Hire* [2011] EWCA Civ 1304 at [13] Longmore LJ (with whom Rimer LJ and Warren J agreed) pointed out that, under RSC O. 29 r. 11, the requirement of insurance applied only to the person against whom the application for an interim payment was being made. He continued (obiter):

> "This has now been relaxed so as to require insurance to exist only in the case of alternate liability, but it is difficult to believe that the framers of the rule, while relaxing that requirement, intended to refuse relief if it was the case that a defendant, who was not being asked to make an interim payment at all, happened to be uninsured."

No contrary submission was made either to the judge or to this court.

15. One of the three alternative requirements is that a defendant "is insured in respect of the claim." In the present case, it appears that YKS and Buttar have taken out policies covering their Employers' Liability and Public Liability respectively, and that the accident happened during the periods of insurance provided by those policies. In the case of each of those policies, insurers have reserved their rights. Neither policy has

been disclosed, but it may be assumed for the purposes of the present argument that the terms of the policies are wide enough to give rise to an obligation to indemnify YKS and Buttar against any liability to the claimant for his accident that may ultimately be established. On behalf of Buttar, Mr McLaughlin confirmed that Buttar maintains that it is entitled to be indemnified by its insurers and that it may safely be assumed that YKS does too.

16. The question is raised whether, in these circumstances, YKS and Buttar are "insured in respect of the claim". The researches of counsel have not discovered any authority on point and I know of none. The practice of an insurer reserving its rights under a policy is well known and frequently invoked. Its proper purpose is to enable an insurer to take steps to establish whether it is liable to indemnify its insured without prejudicing its position while doing so. As such it serves a useful purpose precisely because, in appropriate circumstances, it prevents an insurer having to take a premature decision whether to confirm or decline cover under the policy or to avoid (or repudiate) the policy. By definition, therefore, during the period of reservation of rights, the policy remains extant and, since cover has not been declined and the policy has not been avoided or repudiated, the insured remains insured and will remain insured until their insurance has been brought to an end. As the Judge in this case recognised, different questions may arise if and when an insurer either declines cover or avoids or repudiates the policy; but those questions do not arise here and have not been fully argued before us. I would therefore not wish to express any opinion on those hypothetical questions.

17. I should also make clear that this court is not in a position in the present case to make any assessment of the validity of the decision of insurers in this case to reserve their position. It therefore implies no criticism or endorsement of insurers' position in this case to note that it would be highly undesirable to interpret the requirement of the rule as being dependent on or determined by the decision of insurers to reserve their rights when their reasons for doing so (good, bad or indifferent) will seldom if ever be capable of scrutiny by the court on an application for an interim payment. Mr McLaughlin broadly accepted that this was so. In oral submissions, the possibility was raised of insurers being joined to the action – whether on the application of one of the existing parties or on application by insurers – to enable coverage issues to be resolved: see *Gurtner v Circuit* [1968] 2 QB 587 and CPR 19.2(2). While such provision could of course be made, it remains plain that an interim payment application as such will seldom if ever be an appropriate forum for attempting to resolve the issues of fact and law that may arise on a purported avoidance or repudiation.

18. Mr McLaughlin submitted that the word "insured" in CPR 25.7(1)(e)(ii)(a) should be interpreted as meaning "indemnified" or, more precisely, that the requirement that the defendant is "insured" means that its right to be indemnified has been confirmed. There are four reasons why I would reject that submission. First, it is not what the rule says. Second, if the rule-makers had intended that result, they could and should have said so clearly. Third, the terms of the rule are clear and there is nothing in the context which requires that the word "insured" should be given anything other than its normal meaning. Fourth, to adopt Buttar's proposed interpretation would amount to an open invitation to the parties to engage on inappropriate satellite litigation about whether an insurer's position (either in respect of reservation or avoidance) was correct and, if so, about the prospects of the Defendant being indemnified.

The application for an interim payment and the judgment below

19. Before the Judge below, the Claimant applied for an interim payment against each of YKS and Buttar relying "squarely" upon CPR 25.7(1)(e). There was no evidence before the court that the joists were substandard or that they had been improperly fixed to the walls: it is said in the Claimant's skeleton argument that the joists were re-used after the accident. A witness statement from the Claimant asserted that the third Defendant had been present on site on the morning of the accident and had, in effect, been supervising him. As Buttar is quick to point out, this allegation is not pleaded; and it is denied by the third Defendant in his witness statement for the application.

20. YKS put in evidence before the Court below a statement from its solicitor, which stated that there was "an indemnity issue" and that he was acting on the instructions of Faraday Underwriting Ltd "under a reservation of rights". He exhibited a letter dated 1 June 2021 from other solicitors instructed by Underwriters, Messrs RPC Solicitors, which set out Underwriters' current position, as follows:

> "Underwriters' rights are fully reserved both in respect of the validity of the policy of liability insurance issued to YKS Builders Limited for the period 5 September 2019 - 5 September 2020 and, insofar as the policy may be valid, the terms and conditions of the policy. Underwriters are under no obligation to disclose a copy of the policy to the other parties or to the court and at this stage they do not intend to do so.
>
> The issues which Underwriters are currently investigating include: (1) possible breaches of the Insured's duty of fair presentation of the risk; and (2) possible breaches of policy terms and conditions. The position is subject to change as Underwriters' investigations continue.
>
> Underwriters have taken advice from leading counsel (privilege in which is not waived).
>
> Underwriters' investigations to date have been hampered by a failure by Mr Sharma (the director of YKS Builders Limited) and Mr Sanghera to provide assistance. In particular, the loss adjuster appointed by Underwriters has made requests for documents and information but these have not been complied with in full. The loss adjuster has also requested a further meeting (in person or by video) but to date neither Mr Sharma nor Mr Sanghera has made themselves available. Similar requests by this firm have also been ignored.
>
> Underwriters are concerned to conclude their investigations and make a decision as to indemnity as soon as possible. The insurance issues are complex and detailed and there is regrettably no realistic prospect of this happening either by the date of the interim payment application or in the near future.
>
> Separately and in any event, Underwriters reserve the right to argue in any claim for indemnity under the policy that the making of an interim payment order does not amount to

> ascertainment of liability and does not therefore give rise to an immediate right to indemnity under the insuring clause of the policy. This would mean that Mr Sanghera and YKS Builders Limited would not be entitled to an indemnity in respect of any interim payment order even if the court were to make such an order.
>
> Conclusion
>
> If therefore an interim payment order is made against Mr Sanghera and/or YKS Builders Limited at the hearing on 10 June 2021, Underwriters will not provide an indemnity in respect of that order."

21. A number of points may be immediately noted. First, it is apparent that Underwriters have issued a policy of liability insurance to YKS, with a period of insurance that covers the date of the accident. Second, Underwriters have not produced a copy of the policy for inspection by the Court or others. Third, although it is said that Underwriters are investigating "possible breaches" of the Insured's duty of fair presentation of the risk and policy terms and conditions, they have not repudiated liability under the policy, and the present position is subject to change as their investigations continue. Fourth, and in addition, Underwriters reserve the right to argue that the policy does not respond to an order requiring the insured to make an interim payment. Fifth, the information provided by the letter does not permit the Court to make any assessment of the contractual position save that the policy continues.

22. The third Defendant provided a witness statement in which he said that his solicitors (and those of Buttar) were representing them "subject to a Reservation of Rights whilst our insurers investigate and consider whether to grant an indemnity in respect of this accident. At present, Policy indemnity has not been granted and it has not been confirmed that either I or [Buttar] have insurance cover that will apply in respect of this claim." Once again, this information does not permit the Court to make any assessment of the contractual position save that the policy continues.

23. The third Defendant's witness statement also provided evidence in support of his (and Buttar's) pleaded case. Specifically, he said that the joists had been laid by an independent subcontractor and showed no signs of being substandard; and that he neither had nor had reason to have knowledge that YKS was stacking the bricks and blocks in a manner that did not conform with their obligation to stack them securely on specific loading-out platforms at convenient locations. Buttar's case on the application was that the Court could not conclude that, if the matter went to trial, it was likely that the Claimant would obtain judgment against Buttar (as required by CPR 25.7(1)(c)); it could not be said that, if the case against YKS failed on the basis that it was a conventional and non-negligent manner of stacking bricks but the joists failed when they should not have done, the Claimant must succeed against Buttar (because they had been supplied and laid by independent suppliers and contractors). Accordingly, Buttar submitted, CPR 25.7(1)(e)(i) was not satisfied because, if there was doubt about YKS's liability, the Court could not be satisfied that the Claimant would obtain judgment against one of YKS and Buttar. As an additional argument, Buttar submitted that YKS should not be treated as insured within the meaning of the rule because its insurers may avoid liability . Alternatively, the doubts surrounding the security of YKS's indemnity

should weigh against the Court exercising its discretion in favour of ordering Buttar to make an interim payment, because it may prove to be irrecoverable either from the Claimant or from YKS.

24. After setting out the background facts, the Judge worked his way logically through the terms of CPR 25.7(1)(e). First, he declared that there were two or more defendants and that an order was sought against one or more of them. He then laid out the test for himself as follows:

> "I must be satisfied that if the claim went to trial, the claimant would obtain a judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which). If I am satisfied that that is the case then I need then to be satisfied that the second and fourth defendants are insured in respect of the claim."

25. It is apparent from the judgment that, during the course of argument, the Judge had suggested that CPR 25.7(1)(c) might be relevant and that, if so, the logical course would be to go through the various sub-paragraphs of CPR 25.7(1) sequentially. However, he was dissuaded from this course by the Claimant's confirmation that the application was made only under CPR 25.7(1)(e). The Judge therefore contented himself with saying at [11] of the judgment:

> "[Mr Melton QC, leading counsel for the Claimant,] is in my judgment entitled to do that, so (e) must be the starting place. If I was not satisfied that (e) applied then it seems to me I could go back to the beginning of the rule and start again. In particular, I would no doubt be interested in sub-paragraph (1)(c). It seems to me that the order of consideration is not important. Paragraph(1)(c) and paragraph (1)(e) cannot both be satisfied. The first applies where there is clarity as to the identity of the party against whom judgment will be entered. The second applies where there is no clarity."

26. Returning to the test under paragraph 1(e) the Judge at [12] reminded himself of the relevant passages in *HMRC v GKN* and summarised that advice as being to the effect that:

> "My task is to put myself in the hypothetical position of the trial judge. I should ask myself if I would be satisfied as the trial judge on the balance of probabilities, looking at the material that is before me, whether or not the claimant would indeed obtain judgment for a substantial sum. It is important to emphasise that I am to assess what would happen if there was a trial on that material before me. The decision I must come to is, as Mr McLaughlin has pointed out, a binary decision. It is not enough for me to say I cannot find on the balance of probabilities that judgment would be entered but I think it likely that it would."

27. At [13] the Judge held that, if he were dealing with a trial on the evidence and pleadings as they now stood, he would be satisfied that it was more likely than not that judgment

would be entered against at least one of YKS or Buttar. He said that he was entirely satisfied that he would find breaches of duty owed to the Claimant as a result of which he had suffered injury:

> "The claimant was working on a building site, an inherently dangerous place. The second and fourth defendants were the only bodies who were capable either of making the building site safe or of keeping the claimant safe. That is because the fourth defendant was in effect in charge of the site as the principal contractor, and the second defendant, because I would find that it was responsible for the claimant."

28. The Judge at [14] then turned to the question whether he could be satisfied against which of YKS or Buttar judgment would be entered. His answer was:

> "On the evidence as it is before me I cannot be satisfied against which defendant judgment would be entered. At this stage on the material before me I can only take the relatively broad brush approach that I have already outlined. Precisely where liability lies is, in my judgment, a nuanced decision which will depend on the evidence and submissions heard at trial. As things stand, the material does not allow a firm conclusion one way or the other as to which of the second or fourth defendant would be responsible. I have mentioned that the relationship between the claimant and the second defendant may give rise to the real possibility that it will find itself with a substantial judgment against it, but I remind myself, as the Court of Appeal have reminded me, that a likelihood of that type is quite simply not enough."

29. Having satisfied himself that the damages in the case would be substantial, the Judge turned to the insurance issues, asking himself whether the Defendants were insured in respect of the claim for the purposes of CPR 25.7(1)(e)(ii)(a). He noted the restrictions on avoidance that would apply to YKS's insurers by reason of the Employers' Liability (Compulsory Insurance) Regulations 1998 and that those restrictions would not apply to Buttar's insurers since it is not alleged that Buttar was the Claimant's employer. He then focussed on the requirement that the defendant "is" insured in respect of the claim and held that "it may be in due course that one or the other [insurers] will repudiate, but until repudiation takes place (whether the repudiation has the effect of completely rendering the policy void *ab initio* … or not) as of today the defendants are insured." It is plain from the terms of the judgment that the Judge was concentrating on the insurance of YKS and Buttar.

30. On this basis and for these reasons the Judge decided that the pre-conditions specified in CPR 25.7(1)(e) were satisfied in the present case. But he (undoubtedly correctly) recognised that the satisfying of the pre-conditions merely meant that he had a discretion under the rule; and he turned to exercise it. In favour of ordering an interim payment was, first, that the Claimant needs rehabilitation and he will not get it without an interim payment. As against that, he recorded the Defendant's objections. First, in reliance on *O'Driscoll*, it was submitted that no interim payment should be ordered if it is reasonably likely that an insurer will not pay out the relevant sum. The Judge held

that the evidence and argument that insurers had either a contractual right not to pay out or to repudiate the policy was "very thin", amounting to "a mere assertion in a letter written by solicitors who are not on the record for any party in this case expressing a view as to the future position for the insurers", which he regarded as "loose ground on which to base such a submission". There was nothing before him to suggest that there was any immediate prospect of repudiation and, while recognising that insurers were entitled to adopt this course, he noted that they had chosen to raise the issue by a letter and without providing a copy of their policy.

31. The third factor identified by the Judge as material to his exercise of the discretion was that, in accordance with the provisions of CPR 25.8, the court could at trial order repayment of any interim payment that he made now if it was appropriate to do so. He doubtless had in mind the provisions of CPR 25.8(1) and (2), which permit the court to adjust interim payments including (a) by ordering all or part of the interim payment to be repaid, (b) varying or discharging the order for the interim payment; or (c) ordering a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment.

32. Having decided to exercise his discretion in favour of making an interim payment, he concluded that an interim payment should be made in the sum of £300,000. In the event, by his order now under appeal, he directed YKS to pay £150,000 by 4pm on 24 June 2021 and Buttar to pay £150,000 by 4pm on 8 July 2021.

The grounds of appeal

33. The grounds as formulated by Buttar are:

i) Ground 1: The Judge erred in law in that he failed to consider whether the conditions specified by CPR 25.7(1)(c) were satisfied against the YKS, before dealing with the Claimant's application against YKS and Buttar under CPR 25.7(1)(e).

ii) Ground 2: The Judge erred in law in that he was wrong to conclude that the conditions specified in CPR 25.7(1)(e) were satisfied, in particular: (a) he was wrong to conclude that if the claim went to trial the Claimant would obtain judgment for a substantial amount of money against the YKS or Buttar but he could not determine which; he should have concluded the Claimant would obtain judgment for a substantial amount of money against the YKS but could not determine whether the Claimant would obtain judgment for a substantial amount of money against Buttar as well; (b) The Judge was wrong to conclude YKS and Buttar were insured in respect of the claim; he should have concluded that, due to the fact the insurers of the YKS and the insurers of the Buttar had reserved their rights neither Defendant was insured in respect of the claim, alternatively it was not appropriate to make an order for an interim payment applying the dictum of Griffiths LJ in *O'Driscoll v Sleigh*

iii) Ground 3: The Judge erred in law in deciding in the exercise of his discretion that Buttar should make an interim payment because of the substantial chance the Claimant's claim against Buttar will fail and Buttar will not be able to recover the monies paid because the Claimant is impecunious and the solicitors acting

for YKS's insurers stated there is a very real prospect the YKS will not be indemnified in respect of the Claimant's claim.

Discussion and conclusions

34. There is no substance in Ground 1. The claimant was entitled to bring the application under CPR 25.7(1)(e) and to have it decided under that ground. That is clear from the opening words of CPR 25.7(1), which permit the Court to make an order for an interim payment "where any of the following conditions are satisfied" and the absence of any words requiring a sequential approach to be adopted. Whether it was wise for the Claimant to do so and whether an application under that provision of the rule would succeed are different questions. Furthermore, the Judge was correct at [11] of the judgment when distinguishing between CPR 25.7(1)(c) and (1)(e) and recognising that they cannot both be satisfied: "the first applies where there is clarity as to the identity of the party against whom judgment will be entered. The second applies where there is no clarity." I would dismiss the appeal on Ground 1.

35. Ground 2(a) as formulated is more substantial. Mr McLaughlin argued trenchantly that the Judge should have concluded (adopting the *HMRC* approach) that, if the claim went to trial, the Claimant would obtain judgment for a substantial amount of money against YKS. On that basis, he submits that sup-paragraph (e) has no application, whatever the Judge's view of the case against Buttar. His submission is that the court *can* determine against which defendant the Claimant would obtain judgment within the meaning of sub-paragraph (e)(i) because the case against YKS would satisfy the requirements of sub-paragraph (c). His alternative formulation of the same point of interpretation was that sub-paragraph (e) only applies to defendants who would not be caught by sub-paragraph (c) of which, in this case, there was only one. There are therefore two limbs to his submission, the first of which is evidential and the second of which raises a question of interpretation. I deal with them in that order.

36. Instinctively, the case against YKS appears to be strong because it owed the claimant the normal duties of an employer to their employee and resting bricks and blocks upon joists until the joists fail with the claimant standing below the stack is (at least) strongly suggestive of the negligent adoption of an unsafe system of working. However, YKS asserts that the system being adopted was a safe and accepted method of temporary storage and that it was not responsible for the provision or fixing of the joists. There is reference to video evidence showing the quantity of bricks and blocks, but we have not seen it. The Judge was not in a position (and was not entitled) to conduct a mini-trial of whether storing bricks and blocks on joists was or was not an accepted method of temporary storage or whether the quantities being stacked were excessive so that the employee of YKS who was directing the claimant was negligent. Nor was he in a position to conduct a mini-trial of precisely why the joists failed and whether the apparently optimistic assertion that the accident was, from YKS's perspective, unforeseeable had merit. Mr McLaughlin accepted (rightly, in my judgment) that if the joists were subject to a latent defect or had been inadequately fixed by an independent contractor, YKS could escape liability despite owing non-delegable duties as employer. I can readily conceive that some (and maybe most) judges might have taken a "robust" view of YKS's position and may have been satisfied that, if the claim went to trial, the claimant would obtain judgment against YKS. However, I consider that it was (just) open to the Judge to take the view that he could not be satisfied that would have been the outcome.

37. Mr McLaughlin submitted that there were no circumstances in which YKS would escape liability but Buttar would not. I am prepared to adopt that submission for the purposes of argument, without deciding it. It follows that the possible outcomes being contemplated would be (a) that YKS and Buttar will ultimately be held liable to the Claimant or (b) that YKS alone will be held liable to the Claimant.

38. I am unable to accept Buttar's proposed interpretation of the phrase "(but the Court cannot determine which)" in CPR 25.7(1)(e)(i). To my mind the most natural interpretation of the word "which" in context is that it refers to the several defendants against at least one of whom the claimant would obtain judgment. On that basis, the sub-paragraph applies in any case where the Court cannot determine which defendants (plural) would ultimately be held liable to the Claimant. If, as here, the Court cannot determine whether the claimant would obtain judgment against (a) YKS alone or (b) YKS and Buttar then the court cannot determine which (defendants) would become subject to judgment and the requirements of the phrase are satisfied. I accept that this is the broader of the alternative interpretations, but I see no compelling or persuasive reasons to adopt the narrower interpretation for which Buttar contends, particularly in the light of the protection (albeit not copper-bottomed) provided by sub-paragraph (ii).

39. Given the clear and deliberate changes effected by CPR 25.7 to the previous regime under the RSC, I would merely note that this approach is consistent with the terms of RSC O. 29 r.(1)(c), which I have set out above. I would not base my decision on that consistency.

40. The Judge was astute to follow the guidance (given in respect of CPR 25.7(1)(c)) in *HMRC* and this ground does not disclose any error of principle in his approach; rather the complaint is about the conclusion he reached. For the reasons I have set out above I would uphold the Judge's conclusion that, although he was satisfied that the claimant would obtain judgment for a substantial amount of money against at least one of YKS or Buttar, he could not determine which, within the meaning of sub-paragraph (e)(i). Even if an application against YKS under CPR 25.7(1)(c) would or should have succeeded, and on the factual basis proposed by Buttar, I would hold that the requirements of sub-paragraph (e)(i) were satisfied. I would therefore dismiss the appeal on Ground 2(a).

41. Turning to ground 2(b), for the reasons I have set out above, I would hold that both YKS and Buttar were insured in respect of the claim within the meaning of CPR 25.7(1)(e)(ii)(a).

42. I turn therefore to Ground 3. I would accept that the possibility that YKS's insurers may not indemnify YKS in the event that it is held liable to the claimant is a material feature to be taken into account when the judge came to exercise his discretion. The Judge considered it. He considered that the material before the court in relation to the reservation of rights by YKS's insurers was "very thin". I agree. It was and is open to the insurers not to provide more information, but at present all the Court knows for sure is that Underwriters have issued a policy providing Employers' Liability cover which remains in being despite the reservation of rights. Even less information has been provided in relation to Buttar's insurance, and so the same conclusion applies. Buttar has not shown that the Judge's balancing of factors that weighed in favour or against the exercising of his discretion was either wrong in principle, included immaterial

features, excluded material features, or reached a conclusion that was outside the ambit available to him. I would therefore dismiss the appeal on Ground 3.

43. For these reasons, I would dismiss this appeal.

Elisabeth Laing LJ

44. I agree.

Peter Jackson LJ

45. I also agree.