IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
[2022] EWHC 1404 (Comm)

No. LM-2021-000097

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 20 May 2022

Before:

HIS HONOUR JUDGE KEYSER QC
(sitting as a Judge of the High Court)

B E T W E E N :

DD CLASSICS LIMITED — Claimant

- and -

KENT CHEN — Defendant

MR. J. ROBINSON (instructed by PCB Byrne LLP) for the Claimant

MR. J. VIRGO (instructed by Healys LLP) for the Defendant

J U D G M E N T

JUDGE KEYSER QC:

1 On 29 March 2022 I heard the claimant's application for summary judgment on the claim. I held that, on the basis of the pleaded defence as it stood, the claimant was entitled to summary judgment but that the defendant ought to have an opportunity to apply for permission to amend the defence. The issue as it then stood on the statements of case was whether the defendant had been entitled to terminate the contract for breach of condition. The alternative way of putting the defence, which was to be the subject of further consideration, was whether the defendant had validly exercised a contractual right to terminate the contract: a similar but distinct point.

2 By application notice dated 8 April 2022 the defendant now applies for permission to amend his defence in the terms of a draft accompanying the application notice. The proposed amended case is in my view sufficiently clearly and unambiguously set out. The question, accordingly, is whether the defence advanced by the proposed amendment has a real prospect of success. If it does, I should grant permission to amend. If it does not, the claimant is entitled to summary judgment on the claim.

3 Before I deal with the question I have identified, I make a preliminary observation. On 29 March, I made an order that the defendant pay the claimant's costs of the application to that date. The deadline for payment was 12 April 2022. As of today, 20 May, payment still has not been made. It is said that the defendant was prevented from making payment because he has contracted Covid. I do not accept that that is either a credible or a valid excuse for non-payment. The defendant made a witness statement dated 8 April 2022. In circumstances where he was able to do that and where more than five weeks has elapsed since the deadline for payment, which fell four days after his witness statement, it is simply impossible to see that he could have had any good reason for not making the straightforward transfer of a modest sum of money. This appears to be a case of a wilful non-payment of the costs ordered to be paid.

4 The case that the defendant proposes to advance is set out in paras 7 and 14 of the amended defence. In brief summary, it is said that clause 3 of the contract gave the defendant a right to withdraw if payment were not made within five business days after the due date, which means that it was exercisable immediately after 30 March 2021, or perhaps, in the circumstances, immediately after non-payment on 1 April 2021 for the reasons indicated in my earlier judgment. The primary case is that once the right to withdraw became exercisable, the defendant was entitled to exercise it at any time prior to payment of the remaining balance. The secondary, alternative, case is that extensions of time for payment were expressly or impliedly on terms that preserved the defendant's right to exercise the right to withdraw and that on 13 April 2021, when payment had not been made, the defendant exercised the right to withdraw.

5 The principal point made against the application for permission to amend is that the proposed defence is doomed for the reasons that were set out in my judgment on 29 March 2022 ("the First Judgment"), namely that there had been a waiver of the right to withdraw by affirmation of the contract. I refer to paras 49 - 56 of the First Judgment: [2022] EWHC 1357 (Comm).

6 Mr Virgo makes two preliminary points about the discussion of waiver and affirmation in the First Judgment. The first is that it was obiter, because the reason for my decision was that there was no breach of condition and the question of whether a right to terminate for breach of condition had been lost did not strictly arise. The second is that I made it clear that I was not deciding anything about the loss of a contractual right to terminate the contract. Both of

those points are correct. As to the first point, I see no reason to think that the discussion in the First Judgment was in any way incorrect. As to the second point, however, it is quite right to observe that the principal reason why I gave the defendant an opportunity to propose an amendment of his defence was that it was not entirely clear to me at that point that the discussion in the First Judgment relating to waiver and affirmation was directly applicable to the case of a contractual right to withdraw.

7 The substance of the matter then comes to the question of waiver. As regards terminology, it seems to me that, at least for present purposes, waiver, affirmation and election are all appropriate words with which to consider the issue. They relate, strictly, to different aspects of the question but they do not indicate different conceptual analyses. *Chitty on Contracts* (34th ed.), in a section dealing with provision for discharge in the contract itself, states at para 25-067 under the subheading "Waiver of right to terminate":

> "Conversely, if one party is contractually entitled to terminate the agreement on breach by the other, he may be held to have waived his right to terminate."

Essentially the same position is made, in the context of hire and withdrawal, in *Carver on Charterparties* (2nd ed.) at para 7-576:

> "Where there has been a default in payment which triggers a right of withdrawal or termination, the ship owner must elect: it may either withdraw the vessel and put an end to the charterparty or it may leave the vessel in service and claim damages for the late payment. If it expressly chooses one alternative or the other, no problem usually arises. However, even without an express choice, the shipowner may be treated as having made an election by its conduct. In particular, if, with knowledge of the relevant facts, it acts in a manner which is consistent only with having chosen either to withdraw the vessel or to affirm the contract, it will be held to have elected accordingly. In the latter case it is said to have affirmed the contract and waived the right to withdraw."

(I note in passing that those last two sentences neatly bring together the concepts of *election* to *affirm* giving rise to *waiver*, which goes back to what I said earlier.) In my view, those passages from *Chitty on Contracts* and *Carver on Charterparties* accurately state the law.

8 I turn to the cases. In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, Lord Diplock said at 882-883:

> "'Waiver' is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have 'waived' the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or

> breach of condition; but this is better categorised as 'election' rather than as 'waiver'."

Subject to my misgivings about categorisation, that is a convenient statement of the law.

9 *Mardorf Peach & Company Ltd v Attica Sea Carriers Corporation of Liberia (Laconia)* [1977] AC 850 concerned a charterparty that gave the owners liberty to withdraw the vessel failing the punctual and regular payment of the hire. In the headnote to the report, the first holding conveniently summarises the relevant point: that, on the proper construction of the clause, once a punctual payment of any instalment had not been made a right of withdrawal accrued to the owners, who must give notice of its exercise within a reasonable time; and unless the default were waived, the charterers could not avoid the consequences by tendering an unpunctual payment. The speech of Lord Wilberforce most clearly enunciates the principles and the reasoning of the House. He said at p. 867:

> "The result of this appeal turns, in my opinion, upon the answer to two and only two questions. First, what is the meaning of the withdrawal clause. Second, whether the owners have waived the default of the charterers in not making punctual payment."

As to the meaning of the withdrawal clause, Lord Wilberforce said at p. 867 that he found no difficulty or ambiguity in the clause:

> "It must mean that once a punctual payment of any instalment has not been made, a right of withdrawal accrues to the owners. Conversely, it is incapable of meaning that a charterer who has failed to make a punctual payment can (unless the owners have waived the default) avoid the consequences of his failure by later tendering an unpunctual payment. He would still have failed to make a punctual payment and it is on this failure and by reason of it that the owners get the right to withdraw."

As to the waiver question, Lord Wilberforce said at p. 871 that the argument that there had been a waiver "did not approach success" and he continued:

> "Although the word 'waiver', like 'estoppel', covers a variety of situations different in their legal nature, and tends to be indiscriminately used by the courts as a means of relieving parties from bargains or the consequences of bargains which are thought to be harsh or deserving of relief, in the present context what is relied on is clear enough. The charterers had failed to make a punctual payment but it was open to the owners to accept a late payment as if it were punctual, with the consequence that they could not thereafter rely on the default as entitling them to withdraw. All that is needed to establish waiver, in this sense, of the committed breach of contract, is evidence, clear and unequivocal, that such acceptance has taken place, or, after the late payment has been tendered, such a delay in refusing it as might reasonably cause the charterers to believe that it has been accepted."

Lord Wilberforce's conclusions on the facts of that case were set out in the middle of p. 872. The first point concerned the construction of the right of withdrawal. The other points were:

> "2. The owners must within a reasonable time after the default give notice of withdrawal to the charterers. What is a reasonable time—essentially a matter for arbitrators to find—depends on the circumstances. In some,

indeed many cases, it will be a short time—viz. the shortest time reasonably necessary to enable the shipowner to hear of the default and issue instructions. If, of course, the charterparty contains an express provision regarding notice to the charterers, that provision must be applied.

3. The owners may be held to have waived the default, inter alia, if when a late payment is tendered, they choose to accept it as if it were timeous, or, if they do not, within a reasonable time give notice that they have rejected it."

Those conclusions, albeit set within the context of particular facts, are relevant for present purposes.

10 The final case to which I will make extended ,reference is the decision of the Court of Appeal in *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548, in which the judgment was given by Patten LJ, with whom Arden LJ and Aikens LJ agreed. In simple terms, Rowe (the appellant) contracted to sell certain properties to Barratt (the respondent) on terms that Barratt would redevelop the properties, lease some of them back to Rowe and sell the rest on long leases. The contract contained a condition precedent that Rowe would notify Barratt when A & L, which was a tenant of one of the properties, had been paid certain moneys on termination of its lease and had vacated the property. I take this from [10] of the judgment (the ellipses are mine):

"The completion date specified in the Contract was 1st July 2008 but clause 6.2 contained a series of conditions which had to be met before Barratt could be compelled to complete. If those conditions were not satisfied within 5 months of the Contract (i.e. by 7th July 2008) then either party became entitled to rescind. The construction and effect of these provisions lies at the heart of this appeal and I set them out in full:

'6.2 The Purchaser shall be entitled to refuse to complete until such time as:—

…

(iii) the Deed of Variation has been completed or is ready to be completed simultaneously with completion of the sale and purchase of the Property and the Deed of Variation executed by A & L (as defined in clause 15) is being held by the Vendor's solicitors and has been released to the Vendor's solicitors by A & L's solicitors and the method statement and all matters to be agreed with or approved by A & L pursuant to the Fifth Schedule of the lease have been agreed or approved by A & L the Vendor and the Purchaser in writing (and the Vendor and the Purchaser shall act reasonably and use all reasonable endeavours to agree such matters), and

…

(vi) the Vendor's solicitor has confirmed in writing that all sums due to A & L as a result of the Vendor terminating the Lease … have been paid in full to A & L and receipt has been acknowledged in

> writing (a copy of which has been provided to the Purchaser's solicitors)
>
> Provided That the Vendor or the Purchaser shall be entitled to rescind this contract by serving written notice on the Vendor at any time if the matters referred to in paragraphs (i)-(vi) above have not occurred within 5 months of the date hereof (save where the party purporting to serve such notice is in default of its obligations under this clause 6.2) whereupon this Agreement shall automatically determine (and the Deposit shall be returned to the Purchaser)."

(That clause had been subject to a bit of late amendment which meant that it did not make coherent sense, though sufficient meaning could be given to it.) In fact, after termination Rowe had allowed A & L to remain as tenant at will and postpone payment of the sum due. Barratt served on Rowe a notice purporting to rescind the contract by reason of Rowe's failure to comply with the condition precedent.

11 The Court of Appeal agreed with the judge and held that Barratt had validly terminated the contract. It held that Barratt's right to rescission arose when Rowe failed to comply with its obligations and that Barratt had the right to rescind the contract by service of the notice at any time following the non-satisfaction of any of the conditions. At [17] Patten LJ recorded that Barratt accepted that the service of a valid notice depended on its not being in breach of any of its obligations under clause 6.2 at the date of service of the notice. There was discussion of this point at [49] and following. Rowe said that Barratt could not exercise its right to rescind because, as of the date of the notice (25 November 2008), it remained in breach of the obligation placed upon it under clause 6.2 to act reasonably and use all reasonable endeavours to agree the matters referred to in clause 6.2(iii). However, the judge held that Barratt was in compliance with its obligations when it served the notice, and the Court of Appeal did not interfere with that part of his decision.

12 At [18] Patten LJ recorded Rowe's alternative argument that Barratt's right to rescind had been lost as a result of it having elected by its conduct after the right arose on 7 July 2008 not to rescind the contract: "The conduct relied on is the continuing attempts to agree the specification, method statement and warranties which subsisted up to 25 November." Therefore, as recorded at [67], the argument was that Barratt "...must be taken to have elected to affirm it [that is the contract] by continuing to negotiate about the form of the warranties and other matters right up to 25 November when it served the first notice." The discussion of the point in the judgment is from [65] onwards. At [68], Patten LJ cited the passage that I have read from Lord Diplock's speech in *Kammins Ballrooms*. At [71], after referring to *Peyman v Lanjani* [1985] 1 Ch 457, Patten LJ set out what the judge had had to say, which was essentially that the factual basis of waiver or election (in particular, knowledge of the right to rescind) had not been made out. At [75] Patten LJ, while expressing some criticism of the judge's reasoning, agreed with his conclusion. At [76] he said that the question whether a party with a contractual right to rescind has waived that right by electing to affirm the contract must depend on an analysis of the terms of the particular contract and the circumstances in which the right has arisen. For present purposes, the most important part of the judgment is the following:

> "77. The classic and common situation in which a party to a contract is put to an election of the kind described by Lord Diplock is where the other party has committed the breach of a significant term of the contract amounting to a repudiation. The innocent party is then faced with a

choice between accepting that repudiation and thereby terminating the contract or affirming the contract and thereby waiving the breach. Because the continued performance of the contract is ipso facto likely to amount to an affirmation of the contract, the innocent party is necessarily put to his election and most choose. Similarly in the case of a lease where the tenant commits a breach of covenant entitling the landlord to forfeit, he must decide whether to issue and serve proceedings for possession thereby exercising his right of forfeiture or to accept rent and thereby waive the right to forfeit for that breach. Because an acceptance of rent will necessarily have that consequence under the lease, there is again an immediate election to be made.

78. But not all rights to terminate a contract arise in these circumstances or have the effect of putting the party with the right to rescind to an immediate election. The lease with a break clause entitling the landlord or tenant to terminate the lease after the end of part of the term does not have to be exercised immediately unless the lease so provides. In most cases it will remain exercisable at any time after the right has arisen. The continued acceptance of rent by the landlord will not, without more, operate as a waiver of his rights under the break clause because there is nothing inconsistent between the continuation of the landlord and tenant relationship and the reservation of the right to break. If it is exercisable at any time during the remainder of the term the landlord is not put to an election and does not make an election by continuing to perform the contract until he chooses to exercise his right to break.

79. The same principle applies in my view to the right to rescind under clause 6.2. It conferred upon Barratt the right to rescind the Contract by the service of a notice at any time following the non-satisfaction of any of the specified conditions. In addition, it also precluded the service of a notice if at the time the party in question was in default of its obligations under clause 6.2. In the case of Barratt this was a reference to its obligations under clause 6.2(iii) to act reasonably and to use all reasonable endeavours to agree the specification, warranties and method statement with Rowe and A&L.

80. Barratt was therefore entitled to wait after 7th July before serving its notice and, in the meantime, it was obliged to continue to attempt to agree the form of the warranties and other documents. I cannot see how, in those circumstances, its performance of that obligation was in any way inconsistent with its right to rescind when it was under the contract a necessary pre-condition to the exercise of that right.

81. The correct analysis is, I think, that Barratt did not make an election before 25th November 2008 when it served its notice to rescind and that nothing it did between 7th July and then can amount to a waiver of its rights. It could, of course, have chosen to waive its right to rescind but for that to occur Barratt would need to have indicated its intention to abandon its right in clear and unequivocal terms: see *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 at page 398.

13 This takes us, I think, to a relatively simple legal position. The principles of election, affirmation, and waiver apply equally in the case of a contractual right to terminate a contract as they do in the case of a common law right to terminate upon acceptance of a repudiatory breach. However, the operation of the principles is capable of varying, because it depends upon the construction of the particular contractual right. Thus in the *Mardorf* case: there was an election to be made, which had to be exercised within a reasonable time; there could be affirmation by acceptance of a late non-conforming payment; the right to terminate could be lost by reason of an unreasonable delay in exercising the right. On the facts of the case, there was no acceptance of a non-conforming payment and there was an election to terminate within a reasonable time of the right having arisen. By contrast, in the *BDW Trading* case the contract gave a right to terminate "at any time" after the satisfaction of certain conditions. Therefore the party with the right was not required to elect within a reasonable time whether to exercise it, though it could have conducted itself in such a way as to waive its right. In those circumstances, where it had an ongoing and unlimited right to terminate, the only question was whether its continued performance of its obligations under clause 6.2 constituted affirmation. The answer was that it did not, because such continued compliance was itself a precondition of the continued subsistence of the right to terminate.

14 In the present case, the relevant contractual provisions are set out in the First Judgment. Payment of the sales price was due under clause 3.1 immediately upon the contract being made. In clause 3.2 the parties agreed that the buyer had to pay the sales price within five business days of the due date (i.e. five business days of 24 March). By clause 3(5):

> "If the buyer does not meet his payment obligations according to cl. 3(1) and (2) of this agreement within 5 business days after the due date, the seller is entitled to withdraw from this contract without reminder or setting a deadline."

15 In my judgment, the words "without reminder or setting a deadline" clearly mean simply that the right upon becoming exercisable is exercisable immediately: there is no need for a warning or for a notice making time (so to speak) of the essence for the purpose of the exercise of the right. However, in my view the contract itself is of the kind that was considered in the *Madorf* case, not in the *BDW Trading* case: that is, it is one in which the right was required to be exercised within a reasonable time. It was not simply a right that could be exercised at any time without limit thereafter.

16 Mr Virgo accepts that interpretation of the contract. However, he submits that a reasonable time included the 13-day period from the date when the contractual right arose until the date when it was purportedly exercised on 13 April. I reject that submission. The question is not what was a reasonable time to give to the other party by way of an opportunity to make up for non-performance. The question was what was a reasonable time to decide what to do, that is, whether or not to withdraw. (Cf. the second of the conclusions mentioned by Lord Wilberforce in the *Mardorf* case at p. 872, cited above.) It was entirely simple and straightforward to decide what to do upon non-payment. Thirteen days cannot possibly be considered as a reasonable time in which to make up one's mind as to what one's response would be.

17 In that regard, I was referred to *Chitty on Contracts* at para 27-055 and to *Stocznia Gdanska SA v Latvian Shipping Company & Ors* [2002] EWCA Civ 889, where in the context of a repudiatory breach Rix LJ said at [87]:

> "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing 'writ in water' until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract—such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract."

In the present case, the giving of additional time could perhaps be explained as giving to the claimant an opportunity to make belated albeit non-compliant performance of its obligations, in circumstances where continued non-performance would be capable of making the breach of contract repudiatory. That, however, would go to the question of termination for repudiatory breach, not to the exercise of the contractual right to terminate. As I have already indicated, the reasonable time within which the contractual right was to be exercised was in my view a very short period.

18 However, I consider that the matter goes further and that the defendant affirmed the contract. Mr Virgo submitted that, when one is dealing with a contractual right to terminate, some form of affirmation of the contract is necessary, because the contract is the basis of the right to termination. That seems to me, with respect, to miss the point. The question is whether there was affirmation of the contract as being open for performance.

19 Mr Virgo relied on the dictum of Moore-Bick J in *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia* [1996] 2 Lloyd's Rep 604, 608, to the effect that simply asking the party in default to perform its obligations does not amount in and of itself to a waiver of the right to treat the contract as discharged for repudiatory breach. That is doubtless correct, at least as regards the question of affirmation in the face of a repudiatory breach. But it does not seem to me to meet the difficulty in the present case.

20 The facts are sufficiently set out in the First Judgment: see paras 19 – 29. On 31 March the defendant expressly adverted to the 5-day period for payment in the contract. On 1 April he gave an ultimatum, that if the balance of the price were not paid that day he would call the deal off. Thereafter, however, in full knowledge of his rights, the defendant did not withdraw from the contract. But it went further. Not only did the defendant press for payment; he also answered the claimant's questions concerning the Car and agreed to provide Ferrari with confirmation of the sale with a view to facilitating the completion of the transaction and providing comfort to the claimant. There was then a consensual tender of late payment. There is an issue in the case, which I am not called on to resolve, as to whether the tendered payment constituted a valid payment before the date of the purported termination on 13 April. What is clear, however, it that on 7 April, by consent between the parties, the claimant made a tender of payment and had done all that was in its power to transfer the funds. The contention that the transfer of the funds to the defendant's bank did not constitute valid payment because the defendant's own bank did not credit the funds to his account is, one might have thought, a difficult one to sustain; as I say, I am not required to resolve the point. However, the communications in the first seven days of April show the defendant not only requesting

performance but also actively taking steps to encourage performance and to facilitate the smooth operation of the purchase with Ferrari. There was then the tender of payment by agreement. Thereafter, indeed, Mr Chen purportedly checked with his bank to see whether the funds had been received.

21 In those circumstances, it is my view that, regardless of whether the contractual right to terminate was lost by a failure to exercise it within a reasonable time, and for reasons set out in the First Judgment and equally applicable for present purposes, the defendant had affirmed the contract as being open for performance after the right of termination had arisen. Therefore the defence advanced in the proposed amendment has no real prospect of success and ought not to be permitted. Mr Virgo suggested, somewhat half-heartedly, that the matter requires to be tested at trial. I disagree. The relevant facts are known. Mr Virgo's suggestion appeared to be that the subjective understanding of the buyer (the claimant) might be relevant, but I cannot see how the subjective understanding of either party could be relevant in circumstances where it is plain on the documents and accepted by the defendant that he had sufficient knowledge to be able to affirm the contract. Therefore I can see nothing that requires the proposed amendment to be considered at trial. The point ought to be determined at this stage. I refuse the application for permission to amend the defence. Having done that, I grant to the claimant summary judgment on the claim.

[After hearing further argument]

22 I shall not order a stay. Of course, I cannot pre-judge what the Court of Appeal's view might be of an application for permission to appeal. However, I have to form my own view and I do not see any merit in a proposed appeal.

23 Both the money and (albeit in a rather different way) the Car have been with Mr Chen for a long time. The normal principle is that neither an expressed intention to appeal nor even the filing of an appellant's notice will be a sufficient reason to grant a stay. Mr Chen's own interest in the Car, so far as the evidence goes, is a purely financial interest. I see no good reason why I should order that there be yet further delay in delivering up the car, in circumstances where I found that it should have been delivered long since.

24 It is unnecessary for me to consider whether Mr Chen's failure to pay the costs that I ordered on the last occasion ought to weigh in my discretion. It may have been that it could have been properly taken into account. But I do not need to rely on that for my decision.

25 Accordingly, I will refuse a stay. If the Court of Appeal wants to grant a stay and give permission to appeal, it can of course do so.

[After hearing further argument]

26 As to the principle of payment of costs, there is no issue.

27 As to the basis of assessment of the costs, I do not consider that this is out of the norm so as to engage the discretion to make an order for costs on the indemnity basis. Accordingly, the basis of assessment will be the standard basis.

28 Mr Virgo invites me to order that there be a detailed assessment of the costs and to direct a payment on account of costs now. However, the normal expectation is that in a hearing of this sort, dealt with in half a day and concerning an application that, if successful (as it has been) would be determinative of the costs of the entire claim and their incidence, costs will be summarily assessed. That is in my view the proper course in this case.

29 The court has necessarily to approach the matter with a relatively broad brush. In the present circumstances, the case has been going on for a long time but the scope of the factual issues is narrow. There have been pleadings, but there has been no case management. The length of time since the claim was commenced does not seem to me to be a reliable guide to the level of reasonable and proportionate costs. Apart from pleadings, there has really only been an exchange of views in correspondence and the work associated with the applications. I have already made an order for costs in the sum of nearly £25,000 in respect of the last hearing.

30 In my view, the legal fees net of VAT that are appropriate come to £53,500 on a standard basis for this case. (I shall not state the detailed breakdown that has led me to that figure.) The VAT payable on that is £10,700. That gives a total of £64,200. Added to that are other expenses of £628 and £139.24. That gives a total of £65,967.24, which is just over £5,000 less than the grand total claimed in the budget. That is the amount for which I shall order costs: £65.967.24.

CERTIFICATE

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