



Neutral Citation Number: [2024] EWHC 1004 (Ch)

Case No: BL-2023-MAN-000085

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ

Date: Friday, 3 May 2024

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between :

A. F. Kopp Limited

Claimant

- and -

HSBC UK Bank PLC

Defendant

Mr Daniel Metcalfe (instructed by **BBS Law Limited**) for the **Claimant/Respondent**
Mr Nicholas Cobill (instructed by **Eversheds Sutherland (International) LPP**) for the
Defendant/Applicant

Hearing date: Wednesday 17 April 2024
Date judgment circulated: Tuesday 30 April 2024
Hand down date: Friday 3 May 2024

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HIS HONOUR JUDGE HODGE KC

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Remote hand-down: The court handed down this judgment remotely by circulation to the parties' legal representatives by email, by uploading it to CE-File, and by release to The National Archives. The time and date for hand-down is deemed to be 10:00 am on Friday 3 May 2024.

Banking – *Alleged breach of duty over delay in making funds available to Claimant – Claimant acting as import agent for two third party companies – Claimant suing bank for liability sustained to third parties for their loss of profits – Defendant bank's application for strike out or summary judgment – Contract term excluding liability for indirect or consequential loss – Whether extending to liability pursuant to settlement agreement with third parties for their loss of profits – Whether contract term satisfying the test of reasonableness – Whether claim should be struck out or summary judgment entered for Defendant bank – Unfair Contract Terms Act 1977, ss. 3, 11*

Security for costs – *Whether order for security would stifle the claim – Whether regard to be had to assets of third party companies when deciding whether to order security*

The following cases are referred to in the judgment:

2 Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972 (TCC), [2021] 1 All ER (Comm) 936, 190 Con LR 145, [2021] 1 All ER 527

Armstead v Royal & Sun Alliance Insurance Company Ltd [2024] UKSC 6, [2024] 2 WLR 632

Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)

Fine Lady Bakeries Ltd v EDF Energy Customers Ltd [2020] EWHC 87 (QB)

Frank v Chlorelle Construction Ltd [2010] EWHC 3233 (TCC)

Hadley v Baxendale (1854) 9 Ex 341, 156 ER 145

Last Bus Ltd v Dawson Group Bus & Coach Ltd [2023] EWCA Civ 1297, [2023] 4 WLR 80

Niprose Investments Ltd v Vincents Solicitors Ltd [2024] EWHC 801 (Ch)

Okpabi v Royal Dutch Shell plc [2021] UKSC 3, [2021] 1 WLR 1294

Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies plc [2023] EWHC 2506 (TCC)

Williams v Nu Design & Build Ltd [2021] EWHC 835 (TCC)

His Honour Judge Hodge KC:

I Introduction

1. In 2017-18, the claimant was acting as an import agent for two private limited companies registered in the United States of America, Mike Tronics LLC and A F Kopp LLC. In or around June 2017, the claimant opened a domestic business current account with the defendant, which provides banking and associated financial services. In February 2018 the claimant also opened a foreign currency business account with the defendant. It is common ground between the parties that those bank accounts, and the relationship between the parties, were governed by the defendant's standard '*Business Banking Terms and Conditions*'. It is also common ground that at the time when the defendant was conducting a '*safeguard review*', which led to the claimant's accounts being suspended on 4 December 2018, the applicable terms and conditions were those current as of 1 July 2018. These class the claimant as a '*Small Business Customer*'. Clause 32 addresses the circumstances in which the defendant is not responsible to its customer "*for things that go wrong*". Whether or not the defendant is liable to a small business customer (such as the claimant), pursuant to clause 32, depends upon the type of loss in question: the defendant is liable for "*direct loss of profit*" **and** for "*other direct losses*", **but not** for "*indirect or consequential loss (including lost business, data, profits or losses resulting from third party claims) even if it was foreseeable*". Similar terms and conditions applied when the claimant first opened its domestic account with the defendant in June 2017. By the time the foreign currency account was first opened in February 2018, the applicable terms and conditions corresponded exactly to those contained in clause 32.
2. By a Part 7 claim form, issued on 21 September 2023, the claimant seeks "*damages for breach of contract and/or breach of duty of care in relation to the defendant's provision of financial services*". The claim form was accompanied by: (1) detailed particulars of claim, settled by counsel, and verified by a statement of truth signed by Mr Emmanuel Schleider, the claimant's (now) sole director and shareholder; and (2) the claimant's initial disclosure.
3. This is my considered judgment on an application by the defendant, issued on 19 December 2023, for summary judgment against the claimant under CPR 24, or to strike out the claim pursuant to CPR 3.4 (2) (a). In the alternative, the defendant seeks an order requiring the claimant to provide security for the defendant's costs of the claim (up to the first case management hearing) pursuant to CPR 25.12. On this application, the defendant (and applicant) is represented by Mr Nicholas Cobill (of counsel), instructed by Eversheds Sutherland (International) LLP. The claimant (and respondent) is represented by Mr Daniel Metcalfe (also of counsel), instructed by BBS Law Limited.
4. The application is brought in advance of the service of any defence to the claim. Apart from the acknowledgment of service, stating an intention to defend the entire claim, the only other formal steps in the proceedings have been the service of a CPR 18 request by the defendant, dated 9 November 2023, for further information about the particulars of claim and a (largely noncommittal) response from the claimant, dated 4 December 2023.
5. The evidence in support of the application is contained in the first witness statement of Mr Oliver David Grant, dated 19 December 2023, and exhibit ODG1. Mr Grant is the

defendant's litigation solicitor. Evidence in answer is provided by a witness statement from Mr Schleider, dated 10 April 2024, and exhibit ES1. The defendant takes no point on the lateness of this evidence; and has served evidence in reply in the form of Mr Grant's second witness statement, dated 11 April 2024, and exhibit ODG2.

6. The defendant's application for summary judgment or strike out is advanced on the basis that, to the extent that the claimant has suffered any loss at all (which the defendant does not accept), then the defendant is not liable for such loss because it is specifically excluded by clause 32 of the applicable banking terms and conditions so the claim fails in its entirety. At paragraphs 35-56 of his first witness statement, Mr Grant also advanced an alternative, and secondary, case that the claim has no real prospect of success because there has been no breach of any of the applicable terms and conditions, or of any duty of care owed by the defendant, whether as alleged or at all. However, at paragraph 14 of his second witness statement, Mr Grant explains that as a result of Mr Schleider's witness evidence, the defendant no longer pursues its alternative case on breach at the hearing of this application. On that footing, the sole live issues that fall to be considered on this summary judgment and strike out application are whether the claimant has any real prospect of resisting the defendant's contentions that: (1) as a matter of contract, clause 32 prevents the claimant from recovering the losses it seeks to recover on this claim, even if it succeeds in establishing that those losses were suffered as a result of the defendant's alleged breaches of contract and duty; and, if so, (2) clause 32 satisfies the requirement of reasonableness imposed by s. 3 of the Unfair Contract Terms Act 1977 ('UCTA').
7. The hearing bundle extends to some 620 pages. There is a combined bundle of authorities of some 1,057 pages, embracing some 44 extracts from statutes and regulatory provisions, case law authorities, and practitioners' texts. I have also received detailed written skeleton arguments from both counsel, in each case dated 15 April 2024. With the benefit of my pre-reading, the hearing was comfortably completed within its time estimate of one day, on Wednesday 17 April 2024.
8. In this judgment, I do not propose to rehearse the submissions of counsel in any detail since, although expanded upon in oral submissions, these are adequately set out, and rehearsed, in the written skeleton arguments. Nor do I propose to address every point raised by counsel; although this does not mean that any of them have been forgotten or ignored. Instead, I will confine myself to addressing those points which are strictly necessary to my decision.
9. For structural reasons only, this judgment is divided into the following sections (although these are not self-contained, and the contents of each section have informed others):
 - I: Introduction
 - II: Background
 - III: Summary Judgment
 - IV: Security for costs
 - V: Disposal

II: Background

10. In June 2017, the claimant applied online to open a business current account with the defendant. In its application, the claimant described its principal business activity as: “B2B [*business to business*] and B2C [*business to consumer*] consumer goods including electronics, office supplies and home goods as well as import and export goods”. The claimant estimated its turnover in the next year at £1 million. There was no reference to the claimant operating as an agent of any third party; nor is there any suggestion in the evidence that the claimant ever informed the defendant that it was acting as an agent of any third party at the time it first opened its business current account.

11. Paragraph 16 of the particulars of claim alleges that:

In or about July 2017 the claimant and the defendant entered into a contract pursuant to the terms of which the defendant agreed to provide financial services to the claimant (‘the Banking Contract’). The defendant’s standard terms and conditions were incorporated into the Banking Contract (‘the Standard Terms’).

In his oral submissions, Mr Cobill emphasises that the claimant does not plead that it later opened any other bank account with the defendant, nor does it allege that there was any variation of the banking contract or the defendant’s standard terms. However, it is now common ground on the evidence both that a second, foreign currency, account was later opened in February 2018; and that the banking relationship between the parties came to be governed by later iterations of the defendant’s standard terms and conditions.

12. At paragraphs 15 and 16 of his witness statement, Mr Schleider speaks of a meeting which took place at 10.15 on the morning of 9 February 2018, at the defendant’s branch at 2-4 St Ann’s Square, Manchester, where he and his then co-director, Mr Goldberg, discussed setting up a foreign currency account:

At the meeting, myself and Mr Goldberg met with a lady called Karen Edwards. We had a broad discussion about the nature of the claimant’s business. I recall this included reviewing our most recent transactions (on our bank statements) and the impact of the lack of a foreign currency account. I explained to her that the claimant acted as an import agent for the benefit of Mike Tronics and AF Kopp, which were businesses based in the USA. I explained the difficulties in utilising the current account for foreign currency transactions and that the claimant required a foreign currency account. The currencies that the claimant utilised were primarily USD and Euros. From my recollection, the lady authorised the set up the foreign currency accounts the same day.

There is no challenge to this evidence in Mr Grant’s second witness statement.

13. Mr Cobill points out that there is no plea that any special knowledge was communicated to the defendant in February 2018. On the claimant’s pleaded case, the banking contract was already in place. Mr Metcalfe does not accept that the terms of the particulars of claim preclude any reliance on the special knowledge acquired by the defendant at this

meeting. He submits that it is not necessary for a customer to set out in detail all the changes to its banking contract. Mr Metcalfe says that it is a natural and obvious consequence of the defendant's breach of the banking contract that the claimant's principals might suffer a loss of profits on the resale of the consumer goods that the claimant had been purchasing on their behalf at auction. I shall need to address these submissions in the next section of this judgment when considering the summary judgment application.

14. To ensure compliance with its obligations pursuant to UK anti-money laundering legislation, the defendant carries out periodic reviews of its commercial customers. The defendant styles such reviews its '*safeguard review*' process. From around mid-July 2018 the defendant purported to carry out such a review in relation to the claimant. On 4 December 2018, because of the safeguard review, the defendant placed an '*inhibit*' notice on the claimant's accounts, which prevented payments being made from those accounts. As a result, the claimant could not pay the funds to an online auctioneer, FreeFlow, which were required to settle an invoice, dated 14 November 2018, in the sum of \$698,674.74 for electronic consumer goods which the claimant had purchased at auction as import agents for the two US third parties. This led FreeFlow, which had stringent terms of business, incorporating tight payment deadlines, to cancel the order and remove the claimant's bidding access to its auctions. The claimant alleges that it was thereby in breach of its contractual obligations towards the two US third parties such that it was liable to indemnify them for their resulting loss of profit in the sum of \$1,249,181.96 (with interest thereon).
15. On or about 24 April 2023 the claimant entered into a settlement agreement with the two US third parties in settlement of their alleged causes of action. Pursuant to this, the claimant claims to be liable to make payment to the two US third parties in the sums of: (a) \$1,249,181.96, in respect of an indemnity for loss of profit; and (b) \$431,224.46. in respect of interest. The claimant is also liable to pay interest at the rate of 8% until such time as it makes payment to the US third parties.
16. The claimant alleges that the defendant was in breach of contract and/or in breach of its duty of care owed to the claimant because the safeguard review was carried out "*unreasonably, arbitrarily and haphazardly*". This resulted in denying the claimant access to its funds at a time when it crucially needed to make payment of the FreeFlow invoice dated 14 November 2018. As a result of the defendant's breaches, the claimant claims to have suffered loss and damage in the sum of \$1,680,406.42 (or its sterling equivalent), being its liability pursuant to the terms of the settlement agreement. In circumstances where the claimant is unable to satisfy its liability pursuant to the terms of that agreement until it receives funds from the defendant, the claimant alleges that it will also suffer loss and damage in the form of a continuing liability for interest pursuant to the terms of the settlement agreement.

III: Summary Judgment

17. By CPR 3.4 (2) the court may strike out a statement of case if it appears to the court -
 - (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- (c) that there has been a failure to comply with a rule, practice direction or court order.
18. The application notice expressly seeks to strike out the claim pursuant to CPR 3.4 (2) (a). For such an application to succeed, the defendant must establish that the particulars of claim disclose no reasonable grounds for bringing the claim. The court may conclude that particulars of claim fall within CPR 3.4 (2) (a) if they set out no facts indicating what the claim is about, or if they are incoherent and make no sense, or if they fail to disclose any legally recognisable claim against the defendant. Mr Metcalfe submits that the present application for strike out is inappropriate. The defendant makes no complaint regarding the claims set out in the particulars of claim themselves. Rather, the defendant maintains that it has a defence to such claims by virtue of an exclusion clause. Mr Metcalfe submits that an issue as to the merits of a pleaded defence may be appropriate for summary judgment, but not for a strike out. I agree. In my judgment, this is not an appropriate case for the defendant to seek to strike out the particulars of claim. I therefore dismiss the strike out limb of this application. To be fair to him, Mr Cobill did not actively seek to pursue this aspect of the defendant's application.
19. I have recently detected an unfortunate tendency for applicants to seek to bolster summary judgment applications by incorporating applications to strike out, even in cases where the latter relief is wholly inappropriate. I would encourage legal representatives to desist from this 'scatter-gun' approach, which only serves to divert the court's attention away from the real issues which arise on the summary judgment application.
20. By CPR 24.3, the court may give summary judgment against a party on the whole of a claim or on an issue if -
- (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.
21. Lewison J identified the principles governing an application for summary judgment in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (in terms which have since received the approval of the Court of Appeal). These are set out at paragraph 24.3.2 of the current (2024) edition of Volume 1 of *Civil Procedure*. As applied to an application by a defendant, they may be summarised as follows (omitting citation of authorities)
- (1) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success.
- (2) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
- (3) In reaching its conclusion, the court must not conduct a 'mini-trial'.

(4) This does not mean that the court must take at face value, and without analysis, everything that a claimant says in their statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

(5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to, or alter, the evidence available to the trial judge, and so affect the outcome of the case.

(7) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction; and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question, and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, they will in truth have no real prospect of succeeding on their claim, or successfully defending the claim against them (as the case may be). Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that, although material in the form of documents, or oral evidence that would put the documents in another light, is not currently before the court, such material is likely to exist, and can be expected to be available at trial, it would be wrong to give summary judgment, because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because, '*Micawber-like*', something may turn up which would have a bearing on the question of construction.

22. Relying upon the commentary at para 24.3.3 of Volume 1 of *Civil Procedure*, Mr Cobill emphasises that if an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success, or some other reason for having a trial. A respondent to a summary judgment application who claims that further evidence will be available at trial must serve evidence substantiating that claim.
23. For the defendant, Mr Metcalfe refers me to the dangers highlighted by the Supreme Court in *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294 at [120] of being drawn into conducting a mini trial which leads to the court making determinations in relation to contested factual evidence that are not appropriate on an interlocutory application. The proper approach (identified at [127]) was to ask whether there were "*reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success*".
24. Mr Cobill took me to two passages from *Lewison: The Interpretation of Contracts* (8th edn.). The first, on the role of business common sense, in the preface to section 7 of chapter 1, reads:

If the language of the contract is unambiguous the court must apply it. But if there are two possible interpretations, the court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other. Nevertheless, the commercial consequences of one interpretation as against another do not detract from the importance of the words.

The second, on the general approach to exemption clauses, in the preface to section 5 of chapter 12, reads:

The courts' traditional hostility to exclusion clauses has diminished in modern times, and it may vary with the extent of protection which the clause in question seeks to afford.

25. Since the claimant was contracting on the defendant's written standard terms of business, under s. 3 of UCTA the claimant cannot rely on clause 32 except in so far as it satisfies the requirement of reasonableness. By s. 11 (1) of UCTA, the requirement of reasonableness is "*that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*".
26. During the course of his oral opening, Mr Cobill accepted that to succeed on his application for summary judgment, he would need to demonstrate that the losses claimed represent neither a direct loss of profit, nor some other direct loss, but rather constitute "*indirect or consequential loss*". He acknowledges that the words in parenthesis "*(including lost business, data, profits or losses resulting from third party claims)*" are subordinate to the preceding words, "*indirect or consequential loss*". He also recognises that, by s. 11 (5) of UCTA, it is for the defendant, which claims that this contract term satisfies the requirement of reasonableness, to show that it does.
27. The defendant's position is straightforward: the claimant's pleaded loss is irrecoverable because it is excluded expressly by clause 32. As pleaded at paragraphs 62-64 of the particulars of claim, that loss is the sum the claimant is liable to pay to the two US third parties under the settlement agreement. This '*loss*' arises from the claimant's settlement of prospective claims made against it by third parties. Mr Schleider reveals the motivation behind the claim at paragraph 75 of his witness statement:

It is mortifying that the claimant let down [the two US third parties] so badly. It is honourable for the claimant to seek to recover sums from the defendant in order to satisfy its legal liabilities towards [them].

Mr Cobill contends that this is not a loss that flows directly from the defendant's actions, or from any alleged breach by the defendant, whether of the applicable banking terms and conditions, or of any tortious or statutory duty (as pleaded in the particulars of claim). As Mr Grant explains (at paragraph 34 of his first witness statement):

To the extent that any loss has actually been suffered by the claimant as a result of a breach by the defendant (which is denied), the losses sought under the claim are indirect losses arising from a third party claim which are not recoverable from the defendant by virtue of the exclusion clause. As a consequence, even if the claimant is able to show that the defendant

has breached the terms and/or its duty of care causing the claimant loss (which is denied as set out below), they are unable to recover the losses sought. The claimant therefore has no real prospect of succeeding on its claim and there is no other compelling reason why the claim should be disposed of at trial.

28. Mr Cobill submits that the interpretation issue raises a point of law that can be determined on the papers without any further evidence. The court should therefore '*grasp the nettle*' and finally decide the issue in favour of one side or the other.

29. As well as raising an issue as to the true interpretation of clause 32, the claimant asserts that the clause is unreasonable, and thus unenforceable, under s. 3 of UCTA and/or rule 1.1.6 of the Banking Conduct of Business Sourcebook. Mr Cobill maintains that there is no real prospect of the claimant succeeding in its arguments of unreasonableness, and therefore no reason why the issue cannot be disposed of summarily at this hearing. He notes that the claimant has not developed its argument beyond its bare reference to rule 1.1.6. The defendant's position is straightforward: clause 32 is a standard term (and a market standard, as Mr Grant explains) and complies with the rule. At paragraph 33 of his first witness statement, Mr Grant states:

The exclusion clause is not an unusual provision; it is market standard for financial institutions to limit liability for indirect or consequential loss including losses arising from third party claims. The claimant, as a business customer of the defendant, had accepted the terms and accepts within the claim that its relationship with the defendant was governed by the terms (see paragraph 16 of the particulars of claim).

30. Mr Cobill notes that the claimant argues that the test in s. 11 of UCTA requires the court to have regard to all the circumstances in assessing reasonableness; and that it is only possible for all the circumstances to be considered at trial, having regard to all the evidence once it has been tested by cross-examination. Mr Cobill rejects this argument as incorrect; the defendant has adduced credible evidence in support of its application that clause 32 is reasonable, whilst the claimant has adduced no evidence that it is unreasonable. The courts now take a far less restrictive approach to the interpretation of exclusion clauses than they used to, preferring, instead, to apply the ordinary methods of contractual interpretation. Since there is no real prospect of the claimant succeeding in its arguments of unreasonableness, there is no reason why the issue cannot be disposed of summarily on the present application.

31. Mr Cobill refers me to the decision (handed down on 13 October 2023) in *Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies plc* [2023] EWHC 2506 (TCC). There Joanna Smith J summarily determined the true meaning and effect of an exclusion clause. The legal principles had been fully argued before her; and the respondent could not particularise, even in general terms, any factual evidence which would be available at trial that might affect the clause's interpretation. Mr Cobill points out that paragraphs 99 and 108 of the judgment also demonstrate that s. 3 of UCTA has a narrow application, and cannot be used as a general device to escape from a contract that one of the parties is no longer happy with.

32. I note (from paragraphs 38 and 48-45 of the judgment in *Pinewood*) that Joanna Smith J determined that the respondent had no real prospect of establishing that the exclusion

clause formed part of the applicant's written standard terms of business within the meaning of s. 3 (1) of UCTA. It followed that it was not open to the respondent in that case to contend that the applicant was not entitled to seek to exclude or restrict its liability by reference to the exclusion clause. On that basis, it was unnecessary for Joanna Smith J to proceed to the second stage of the inquiry that does arise in the present case, and to consider the separate question of whether the clause satisfied the requirement of reasonableness in s. 11 of UCTA.

33. In summary, therefore, for the defendant, Mr Cobill submits that the ordinary meaning of the words in clause 32 is not open to more than one possible interpretation, and can be decided summarily, without resort to any background material or extrinsic evidence. The losses claimed at paragraphs 62-64 of the particulars of claim result from the claimant's alleged liability to indemnify the two US third parties for their loss of profits on the electronic consumer goods for which the claimant had successfully bid at FreeFlow's November auction. This was not a direct loss suffered by the claimant, but rather an indirect or consequential loss, parasitic upon a loss allegedly suffered by the two US third parties. It therefore falls within the category of loss excluded by clause 32. The unchallenged evidence of Mr Grant (at paragraph 33 of his first witness statement) is that this exclusion clause "*is not an unusual provision; it is market standard for financial institutions to limit liability for indirect or consequential loss including losses arising from third party claims*". There is therefore no real prospect of the claimant establishing that the clause fails to satisfy the requirement of reasonableness. Mr Cobill contends that his application has a sound basis in law, and is supported, even at this early stage, by sufficient documentary evidence that shows the claimant has no real prospect of success. He invites the court to grasp the nettle, and to decide the application in the defendant's favour.
34. Mr Cobill contends that this is a claim devoid of any real prospects of success, and there are no other compelling reasons for the claim to proceed to trial. The claim is unwinnable, it is without any possible benefit to the claimant, and it would waste resources on both sides for there to be a trial.
35. For the claimant, Mr Metcalfe emphasises that by clause 32 the defendant absolutely and categorically assumes liability for "*direct loss of profit*" and "*other direct losses*", excluding liability only for "*indirect or consequential loss*". The list in parenthesis that follows "*(including lost business, data, profits or losses resulting from third party claims)*" is quite obviously not intended to define what constitutes "*indirect or consequential loss*" because it is in brackets; it is an aside, and it uses the word "*including*". Further, the list includes a reference to "*profits*", which can only mean profits that constitute an indirect or consequential loss because the defendant has expressly assumed a liability for "*direct loss of profits*". It follows that any other items in the list are excluded only to the extent that they *constitute* "*indirect or consequential loss*". To the extent that they constitute direct loss, they are covered by the wide provision imposing liability for "*other direct losses*". I understand Mr Cobill to accept this line of reasoning. In any event, I have no doubt that it is correct.
36. Mr Metcalfe submits that whether loss is a direct or an indirect loss depends upon whether the loss falls within the first or the second of the two limbs set out in the seminal decision of the Court of Exchequer in *Hadley v Baxendale* (1854) 9 Ex 341, 156 ER 145. "*Direct loss*" constitutes loss that is within the reasonable contemplation of the parties because it may fairly and reasonably be considered as arising naturally,

according to the ordinary course of things; whilst “*indirect loss*” is loss that may reasonably be supposed to have been within the reasonable contemplation of the parties because of some special circumstances made known to both parties at, or prior to, the time the contract was made.

37. Mr Metcalfe suggests that perhaps the most recent, and detailed, exploration of the authorities on the meaning of indirect or consequential loss in a contractual exclusion clause is to be found at paragraphs 218 to 241 of the judgment of O’Farrell J in *2 Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC). The conclusions I derive from O’Farrell J’s detailed and helpful analysis of the authorities are that: (1) the meaning of “*indirect or consequential loss*” in an exemption clause usually means the exclusion of losses falling within the second limb of *Hadley v Baxendale*; but (2) in the absence of any express judicial consideration of the particular clause in question, it should be construed on its own wording, and in the context of the particular agreement as a whole, and its particular factual background.
38. Mr Metcalfe submits that the losses claimed in this case are losses directly suffered by the claimant as a result of the defendant’s alleged breaches of duty. At the time the foreign currency account was opened, the nature of the claimant’s business - acting as an import agent for the benefit of the two US third parties - had been explained to the defendant. Accordingly, the US third parties’ loss of profits on the onward sale of any goods that the claimant had contracted to purchase on their behalf was an obvious consequence of any failure on the part of the defendant to honour the claimant’s instruction to effect payment for these goods from its bank account with the defendant. In any event, any determination as to the direct, or indirect, nature of the claimant’s loss involves consideration of the defendant’s knowledge, which is not appropriate for summary judgment on the papers.
39. Further, and in any event, since the claimant was contracting on the defendant’s written standard terms of business, s. 3 of UCTA is engaged. S. 11 (1) of UCTA provides that the requirement of reasonableness “... *is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*”. S. 11 (2) references a list of factors for consideration at schedule 2. These are not specifically stated to govern the application of s. 3; but, in practice, the courts have used schedule 2 as a starting point for assessing reasonableness. It is important to note, however, that there is no limit to the circumstances that may be taken into account. S. 11 (5) firmly places the burden of proving reasonableness on the defendant since it “*is for those claiming that a contract term ... satisfies the requirement of reasonableness to show that it does*”.
40. Mr Metcalfe emphasises that the reasonableness of clause 32 can only be determined on the evidence at trial, and not on a summary judgment application, so the court should not determine the issue of construction on this present application. Moreover, one should not conflate the guidance in the authorities on the summary determination of short points of construction with the determination of the issue of the reasonableness of clause 32. Mr Metcalfe counsels the court against being drawn into conducting a mini-trial that might lead to the court making determinations in relation to contested factual evidence that are not appropriate on an interlocutory application. He points to a trilogy of authorities in which the court has emphasised that it is inappropriate to determine the reasonableness of an exclusion clause on an application for summary judgment, rather

than at trial: *Fine Lady Bakeries Ltd v EDF Energy Customers Ltd* [2020] EWHC 87 (QB), especially at [86]-[91] per Farbey J; *Williams v Nu Design & Build Ltd* [2021] EWHC 835 (TCC), especially at [11]-[12] per Mr Recorder Andrew Singer QC; and *Last Bus Ltd v Dawson Group Bus & Coach Ltd* [2023] EWCA Civ 1297, especially at [1] and [50]-[56]. In the latter case, Phillips LJ (with whom Bean and Singh LJJ agreed) explained (at [1]) that the issue raised by the appeal was whether, on an application for summary judgment, the creditor had established the enforceability of a standard form exclusion clause, incorporated into each of a series of hire purchase agreements, so that the hirer's claim for damages was rightly dismissed as having no real prospect of success; or whether the question of reasonableness should have been left to a trial. The Lord Justice added:

The issue may be of wider importance as neither party's counsel has found any previous decision, at any level, in which a challenge to the reasonableness of a contract term under UCTA was dismissed summarily rather than following a full trial or the trial of a preliminary issue.

At [53], Phillips LJ stated that one of the errors on the part of the judge in the court below had been

... to hold that a trial was not necessary to determine the question of reasonableness. Apart from the general point that such a fact-sensitive issue would ordinarily require a trial (although I do not say that the issue could never be determined on a summary basis), in this case there were obvious matters that required investigation.

I note that although the judgment in *Last Bus* was handed down as recently as 10 November 2023, the hearing had taken place on 20 July 2023, which may explain why there is no reference to the decision of Joanna Smith J in *Pinewood*. Clearly, this is a fast-developing area of the law.

41. In light of these authorities, Mr Metcalfe submits that that is the end of the matter in terms of a summary judgment application. The legal and factual issues are complex, and much of the evidence required for an assessment of reasonableness is not before the court. Notwithstanding that the burden of proof rests with the defendant, it has done little to adduce any evidence to aid the court with any assessment of the reasonableness of clause 32.
42. In any event, there are a number of known factors that lend themselves to a finding that the exclusion clause is unreasonable:
 - (1) The defendant is a considerably larger business than the claimant, with the latter having no real strength of bargaining position.
 - (2) The defendant has produced no evidence that the incorporation of clause 32 was negotiable. It may be anticipated that it was non-negotiable, since Mr Grant's evidence is that it is a market standard.
 - (3) Mr Schleider's evidence is that the claimant did not know about the existence of clause 32 until it came to the attention of its legal team in 2019.

- (4) Clause 32 was hidden away on page 26 of the claimant's standard terms, which run to 29 sections, extending over 30 pages.
- (5) The defendant provided no adequate notice of the incorporation of clause 32, by reference, for example, to bold or large writing, or capital letters, in a prominent place in a relevant communication.
- (6) The defendant did not provide any inducement or benefit to the claimant to have it agree to the incorporation of clause 32.
- (7) Considering the nature of the claimant's business, on the defendant's construction, clause 32 was always intended to deprive the claimant of any real remedy, as its loss and damage was always most likely to be constituted by way of a liability to its principals.
43. There are also a number of unknown factors that require further exploration (whether by way of disclosure, witness evidence, expert evidence, or cross-examination), which strongly negate the possibility of summary judgment:
- (1) The defendant has produced no evidence of whether or not its competitors include similar exclusion clauses within their standard terms and, therefore, whether there were any alternative means by which the claimant could have its needs met.
- (2) The defendant has produced no evidence as to the availability or the terms of any insurance products intended to meet the type of liability that the claimant incurred, such that its needs could have been met by alternative means.
- (3) The knowledge of the defendant regarding the claimant's business and its susceptibility to third party claims in the event of the defendant's breach of duty is an issue at large and requires disclosure, witness evidence, and trial.
44. Mr Metcalfe submits that the defendant cannot discharge the heavy burden of demonstrating that it is not properly arguable that this contract term is unreasonable. By way of contrast, Mr Cobill submits that none of Mr Metcalfe's challenges to the reasonableness of clause 32 is more than merely arguable; and none of them has any real prospect of success.
45. In summary, those were the submissions.
46. At paragraphs 12 and 13 above I indicated that I would need to consider whether I should have regard to the special knowledge of the claimant's role as import agent for the two US third parties for the purposes of the present application. I have no doubt that I should, for the following reasons.
47. First, procedurally the present claim has not yet proceeded to the stage of the service of a defence since the defendant has elected to proceed by way of application for summary judgment. There is, as yet, no plea that the losses claimed are irrecoverable, either by reason of clause 32, or on grounds of remoteness. In those circumstances, I do not consider that the claimant was required to anticipate such defences being raised by pleading the February 2018 meeting with Ms Edwards, or asserting that this gave rise to any relevant special knowledge on the part of the defendant.

48. In *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] UKSC 6, [2024] 2 WLR 632 at [62]-[64], the Supreme Court considered the question of who has the legal burden of proof in relation to remoteness in the tort of negligence. In their joint judgment (with which the other members of the Court all concurred), Lord Leggatt and Lord Burrows JJSC held that the legal burden of proof must lie on the defendant to plead, and prove, that any loss which was in fact caused by the defendant's tort is nevertheless irrecoverable because it is too remote. The underlying justification for this approach was said to rest on considerations of both fairness and efficiency:

Once it has been proved that the defendant has committed a wrong which has caused loss to the claimant, it is fair to place the onus on the wrongdoer to show a good reason why the wrongdoer should not be liable to compensate the victim for the full extent of the loss caused. In addition, it would be unduly burdensome to require a claimant who has proved that the defendant committed a tort which has caused the claimant loss to have to anticipate ways in which it might nevertheless be said that the defendant should not be held legally responsible for the loss and rebut them. It is far more efficient, as well as just, to place the burden on the defendant to make such a case ...

Here, as generally, the rules of pleading are a good guide to where the burden lies in accordance with the principle that the person who asserts (and not the person who denies) must prove ... It is not the practice, when pleading claims for the remedy of damages for the tort of negligence, for claimants to allege that losses claimed were of a reasonably foreseeable type any more than it is the practice for claimants to plead that they took all reasonable steps to mitigate the loss, or that they were not contributorily negligent, or that no intervening cause broke the chain of causation. In all these cases, in our view, the pleading practice is an accurate indication that the defendant bears the burden of proof.

Although this authority was not cited to me by either party, I see no reason to call for further submissions in relation to it because it merely reflects, and confirms, my understanding of the legal position. Although in terms directed to the legal burden of proof in relation to remoteness of damage in the tort of negligence, I can discern no reason why the guidance provided by the Supreme Court should not also apply to remoteness of damage for breach of contract. It would also seem to me to apply equally where reliance is placed upon an exemption clause.

49. Second, it is clear from Lewison J's summary of the authorities in *Easyair* that the court must take into account both the evidence actually placed before it on the application for summary judgment, and also the evidence that can reasonably be expected to be available at trial. Here Mr Schleider's account of the February 2018 meeting is in evidence, and is presently unchallenged. Clearly the court should have regard to it when determining this summary judgment application.
50. Third, if I am wrong in both the foregoing respects, and the court should not have regard to this evidence because the February 2018 meeting is not presently pleaded, I am satisfied that I should not determine this summary judgment application without giving Mr Metcalfe an opportunity to amend his particulars of claim. In *Niprose Investments Ltd v Vincents Solicitors Ltd* [2024] EWHC 801 (Ch) at [71], I expressed the view that

the court should not strike out a statement of case, or enter summary judgment against a party, without giving the party concerned an opportunity of curing any defects or omissions in their pleaded case, provided, of course, that there is good reason to believe that they will be in a position to do so, and they invite the court to take that course. Unsurprisingly (since I only formally handed down my judgment in *Niprose* 30 minutes before I began hearing the instant application), I was not referred to this authority. However, it decides nothing new, and merely confirms the law as set out in previous authorities.

51. I therefore propose to determine this application on the footing that at the time the claimant opened its foreign currency account with the defendant, and when the terms of clause 32 became applicable to that account, the defendant had special knowledge of the claimant's role as import agent for the two US third parties. Mr Metcalfe submits that, as a result, the losses claimed in this case are losses directly suffered by the claimant as a result of the defendant's alleged breaches of duty. This is because the US third parties' loss of profits on the onward sale of any goods that the claimant had contracted to purchase on their behalf was an obvious consequence of any failure on the part of the defendant to honour the claimant's instruction to effect payment for these goods from its bank account with the defendant.
52. I do not agree with Mr Metcalfe's characterisation of these losses as falling within the first limb of the two-fold characterisation adopted in *Hadley v Baxendale*. I remind myself of Alderson B's classic statement of the rule as to the recoverability of damages for breach of contract, as set out in that case at 354:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

53. In my judgment, the claimant's alleged liability for the two US third parties' loss of profits on the onward sale of any goods that the claimant had contracted to purchase on their behalf cannot fairly and reasonably be considered as arising naturally, according to the usual course of things, from the failure on the part of the defendant to honour the claimant's instruction to effect payment for these goods from its bank account with the defendant. Rather, it arises from the special circumstances of the agency relationship between the claimant and the two US third parties which were communicated to the defendant during the course of the February 2018 meeting. As such, it would seem to me to fall within the second limb of the rule in *Hadley v Baxendale*.
54. I have already indicated that the conclusions I derive from O'Farrell J's detailed and helpful analysis of the authorities in *2 Entertain Video* are that: (1) the meaning of "indirect or consequential loss" in an exemption clause usually means the exclusion of losses falling within the second limb of *Hadley v Baxendale*; but (2) in the absence of any express judicial consideration of the particular clause in question, it should be construed on its own wording, and in the context of the particular agreement as a whole, and its particular factual background.

55. If I am correct that the claimant's alleged losses are within the second limb of *Hadley v Baxendale*, then they would seem to fall within the scope of the exclusion from liability in clause 32. If my characterisation of such losses is incorrect, then it is necessary to consider whether such losses fall within the meaning of the phrase "*indirect or consequential loss*", considered in the context of the banking contract as a whole, and its particular factual background. On this approach, I strongly incline to the view that the claimant's losses are "*indirect or consequential losses*" rather than "*direct losses*". In my view, a "*direct loss of profit*" would be represented by any loss of profit directly sustained by the claimant itself, as from the loss of any commission that it would have earned from the two US third parties had the contracts for the purchase of the goods for which it had successfully bid at the online auction ever been fulfilled. In my view, "*other direct losses*" would be exemplified by the claimant's costs of securing some alternative banking, or finance, facility to fund the purchase of those goods when the defendant suspended the claimant's banking facilities. The claimant's liability for any loss of profits sustained by the two US third parties, however, would seem to me to be an "*indirect or consequential loss*".
56. Had the issue of the true construction of clause 32 been the only live issue on this summary judgment application, then I would have grasped the nettle and determined it since I am satisfied that all the evidence necessary for the proper determination of that question is before this court, and that both parties have had an adequate opportunity to address it in argument. However, there is also the separate issue of the reasonableness of clause 32. This is an issue on which the ultimate burden of establishing the reasonableness of clause 32 rests with the defendant.
57. I recognise that, in an appropriate case, a challenge to the reasonableness of a contract term under UCTA might be capable of summary disposal, rather than determination after a full trial or the trial of a preliminary issue. However, given the fact-sensitive nature of such a challenge, such cases are likely to be extremely rare; and I note that in *Last Bus* neither party's counsel had been able to find any previous example of such a case, at any level. In the present case, I am satisfied that there are obvious matters that require further investigation which can only be undertaken at trial. Mr Metcalfe has identified a number of factors, which I have listed at paragraph 42 above, that give rise to a real prospect of a finding that the exclusion clause is unreasonable. He has also identified a number of factors (listed at paragraph 43 above) that require further exploration, and which strongly militate against any order for summary judgment. For the reasons that he gives, I accept Mr Metcalfe's submissions that the defendant cannot discharge the burden of demonstrating that the claimant has no real prospect of successfully challenging the defendant's assertion that clause 32 is an unreasonable contract term. Indeed, in my judgment, it is fanciful to suggest that the claimant's reliance on the unreasonableness of clause 32 lacks sufficient merit to amount to a reasonably arguable answer to clause 32 for the purposes of a trial.
58. Having decided that it would not be appropriate to grant summary judgment in favour of the defendant because the reasonableness of clause 32 requires determination at trial, it would not be desirable for me to embark upon any authoritative interpretation of that clause. That is an exercise better left to the trial judge, who will have all the relevant evidence. It would not be right for me, on the hearing of a summary judgment application, to attempt to fetter the freedom of the trial judge to reach their own determination as to the true meaning and effect of clause 32. Further, it would not be

fair on the claimant for me to express any concluded determination as to the true interpretation of that clause adverse to the claimant since, as a result of my decision to dismiss the summary judgment application on alternative grounds, there would be no proper basis for challenging any decision I might make on the true interpretation of clause 32 by way of appeal. The views I have already expressed on the interpretation of clause 32 should not be treated as an authoritative, and final, decision on the true meaning and effect of that clause.

59. In summary, therefore:

(1) I dismiss the application to strike out the claim form and particulars of claim as manifestly ill-founded.

(2) I dismiss the application for summary judgment in favour of the claimant on the footing that there is a triable issue, with real prospects of success, that clause 32 fails to satisfy the requirement of reasonableness in s. 3 of UCTA.

(3) I venture no definitive view on whether the losses claimed from the defendant constitute “*indirect or consequential loss*” for the purposes of that clause.

IV: Security for costs

60. Mr Cobill submits that if the court is not minded to grant summary judgment in the defendant’s favour, or to strike out the claim, then the court should order security for costs because there is reason to believe that the claimant company will be unable to pay the defendant’s costs if it is ordered to do so.

61. Mr Schleider addresses the issue of security for costs at paragraphs 73 to 78 of his witness statement. He accepts that the gateway to such an order at CPR 25.13 (2) (c) is met because there is reason to believe that the claimant would be unable to pay the defendant’s costs if ordered to do so. However, it is the claimant’s position that, in all the circumstances, the court should exercise its discretion against the defendant.

62. First, Mr Metcalfe invites the court to note that it was the defendant’s conduct that gave rise to the collapse of the claimant’s business. In the autumn of 2018, Mr Schleider claims that he was in the process of agreeing a commission structure or profit share with the two US third parties. Considering the manner in which the business was growing, Mr Schleider was confident of success.

63. Second, the claimant is in no position to make any payment by way of security for costs. The effect of any order for security would be to stifle the claim and deny the claimant access to justice. Mr Schleider finds it mortifying that the claimant let down the two US third parties so badly. It is honourable for the claimant to seek to recover damages from the defendant in order to satisfy its legal liabilities towards the two US third parties.

64. Mr Schleider explains how this claim is being funded, essentially on a discounted conditional fee agreement, with out-of-pocket expenses being met on a piece-meal basis out of his modest income and family loans. He does not have any family or friends who could lend the claimant the funds to put up any security for costs, certainly in the sort of amount that the defendant seeks. Mr Schleider does not believe that he would be able to borrow from any financial services provider. He notes that the defendant posted pre-

tax profits of £3.6 billion on revenue of £8 billion in its last filed accounts. This is a classic instance of David litigating against Goliath.

65. Mr Cobill submits that there is a wholesale evidential failure in relation to the claimant's asserted inability to satisfy any costs orders. There is no evidence whatsoever from the claimant of any request to its alleged principals to provide any funding or to put up any security. Nor is there any real evidence that the conduct of the defendant caused the collapse of the claimant. Its accounts show that it was not making any money before the safeguard review process started; and more than a year into its agency contract, it had still not succeeded in negotiating to receive any commission or share of profits. I note that any claim for loss of profits or commission on the cancelled FreeFlow auction contract is conspicuous by its absence from the claimant's pleaded particulars of loss.
66. The authorities are said to show that where the threshold condition in CPR 25.13 (2) (c) has been satisfied, it will ordinarily be just to order security unless the effect of doing so would be to stifle the claim, with the burden resting on the claimant to establish that fact on the balance of probabilities. The burden is on the claimant to adduce sufficient evidence to support the assertion that there is no prospect of it raising funds from any realistic source in order to pay the defendant's costs in the event the defendant were to win at trial. If the court considers that there is any serious prospect of the claimant being able to raise funds, then an order for security may be made. The claimant must be full and frank in relation to such matters. It is irrelevant that raising security might be difficult for the claimant since that is inherent in the nature of the jurisdiction. If the gateway is satisfied, but there is insufficient evidence that the claim would be stifled, security should be provided.
67. Mr Cobill refers me to observations of HHJ Wilcox in *Frank v Chlorelle Construction Ltd* [2010] EWHC 3233 (TCC) at [3]-[5] that the balancing exercise is one that must relate to the prejudice both to the claimant against whom security is sought but also the defendant who seeks security to protect their position. The judge was

... not persuaded that the onus of showing that more money cannot be raised has been discharged by the claimants. In fact, there is a list which is considerable of interested parties and they are the real litigants who stand in the shoes of Chlorelle now and stand to gain. There is, I am satisfied, at present evidence of an unwillingness to put their hands in their pocket but there is no evidence before me of an inability to raise money essentially to protect their own interest. They are the gainers if they do. So this is not a case, it strikes me, where this litigation is being stifled or would be stifled if security or a security for costs order in addition to the ATE were ordered by this court. If the litigation did not proceed, it would proceed in consequence of the unwillingness of the parties who seek to be protected, i.e. the creditors, to put their hands in their pockets and given the number of them that would be a comparatively modest exercise for each of them to protect their own position. There is no question in my view of stifling here.

In the course of his oral submissions, Mr Cobill accepted that his strongest point was that there is no evidence of any approach for funding to the two US third parties who, under the terms of the settlement agreement, stand to gain significantly from the success of this litigation.

68. In summary, Mr Cobill submits that:
- (1) the defendant meets the gateway criteria in CPR 25.13 (2) (c);
 - (2) the claimant has failed to adduce sufficient evidence as to its inability to pay any costs orders or to provide any security;
 - (3) the claimant has failed to adduce sufficient evidence that an order for security would stifle the claim; and
 - (4) the claimant has failed to adduce sufficient evidence that the defendant is responsible for its financial collapse.
69. The defendant therefore invites the court to make an order requiring the claimant to provide security in the sum of £53,724.85, representing the costs of the work already done and that necessary to bring the case to a CCMC (excluding VAT). I note that this sum includes £6,988.75 in respect of the defendant's application for security for costs.
70. Mr Metcalfe accepts that the gateway at CPR 25.13 (2) (c) is satisfied, such that, pursuant to CPR 25.13 (1), the court may order security for costs if, in all the circumstances of the case, it is just to do so. The court's discretion must be exercised in accordance with the overriding objective at CPR 1.1. The court may also be guided as to the exercise of its discretion by the notes at paragraph 25.13.1 of Volume 1 of *Civil Procedure*. Mr Metcalfe submits that the claimant plainly has a bona fide claim, and this enjoys a reasonably good prospect of success. He accepts that the application for security for costs was made at an early stage in the proceedings. Thus, the issues for consideration by the court are the reasons for the claimant's impecuniosity, and whether an order for security for costs would stifle the claim.
71. Having regard to the totality of the evidence before the court, Mr Metcalfe says that it is clear that the claimant's business model was working well until the defendant suspended its payment services. It was plainly the defendant's breach that gave rise to the collapse of the claimant's business. It is the claimant's position that an order for security for costs would stifle the claim because an order for payment of security for costs could not be complied with. Mr Metcalfe accepts that the court should consider the ability of third parties (such as directors and shareholders) to fund an order for security for costs; and that the onus is on the respondent to the application to satisfy the court as to stifling. However, he cautions against adopting too mechanistic an approach.
72. Plainly the claimant does not have the financial resources to comply with any order for security for costs. Mr Schleider has provided candid evidence regarding his own financial position. He is making small *ad hoc* loans to the claimant for the purposes of paying its legal costs, which are limited in consequence of its legal team acting on a discounted CFA.
73. Mr Schleider has no way of raising any significant sums. Whilst he has an equitable interest of about £85,000 in his family home, he is not in any financial position to remortgage it. Mr Schleider is owed £50,000 by his brother's company, but there is presently no prospect of obtaining repayment of such sum. Mr Schleider has just over £54,607 in his current account, but the same constitutes borrowed monies that must shortly be repaid to his sister and brother-in-law in time for them to pay the deposit on

a family home they are purchasing. Mr Schleider has no prospect of borrowing any significant sums from family or friends. The income of Mr Schleider and his wife is only about £28,000.00 per annum; and they have six children within their care.

74. On the evidence, Mr Metcalfe submits that it is more likely than not that the claim would be stifled if the court were to make an order for security for costs. Further, so far as practicable, CPR 1.1 (2) (a) requires the court to ensure that the parties are on an equal footing; and 1.1 (2) (c) (iv) requires the court to deal with the case proportionately, having regard to the financial position of each of the parties. The defendant is a multi-national company, with assets of £342 billion in 2022. It made a profit of £3.6 billion in 2022. The claim is likely to be one of many in which the defendant is involved, and it no doubt has an allocation of resources for litigation. The claimant already faces inherent unfairness in fighting a claim against a party with, effectively, limitless resources. It would be grossly unfair to prejudice the claimant's ability to pursue its claim by way of an order for the payment of security for costs.
75. In response to the court's observation that there is no evidence of any approach to the two interested US third parties, Mr Metcalfe asserts (without any evidence) that such an approach would have been unlikely to have succeeded. The two US third parties had had no relationship with the defendant, which was not concern of theirs. It would not be realistic to expect them to fund this litigation since they have no direct interest in the claimant.
76. Having considered all the parties' submissions, I am satisfied that this is an appropriate case to make an order for security for costs. The threshold condition conferring the jurisdiction to make such an order is admittedly satisfied. In my judgment, such an order would be just and expedient, and would further the overriding objective. I do not accept that the claimant's recent financial situation is the result of the defendant's conduct. It was not making any profits before the suspension of its banking accounts. In any event, its only customers were the two US third parties.
77. In my judgment, the critical factor justifying an order for security for costs is that this litigation is being brought entirely for the benefit of the two US third parties. I have already set out (at paragraph 27 above) Mr Schleider's expressed motivation for bringing this claim, as expressed at paragraph 75 of his witness statement:

It is mortifying that the claimant let down [the two US third parties] so badly. It is honourable for the claimant to seek to recover sums from the defendant in order to satisfy its legal liabilities towards [them].

78. I have no evidence of the financial standing of either of the two US third parties. Therefore the claimant cannot assert that they lack the necessary assets to fund any order for security. Nor is there any evidence of any approach to them to fund this litigation. Mr Metcalfe asserts (without any evidence) that such an approach would have been unlikely to have succeeded because the two US third parties had no relationship with the defendant, which was no concern of theirs. He submits that it would not be realistic to expect them to fund this litigation since they have no direct interest in the claimant. However, this litigation is being brought expressly to enable the claimant to satisfy its legal liabilities towards them. I reject Mr Metcalfe's implicit submission that they have no interest in the outcome of this litigation. They have every interest in its success. Without it, they will recover nothing by virtue of their settlement agreement

with the claimant. They are the two entities who stand to gain from this litigation. It is reasonable to expect them to fund this action. The assertion that this claim will be stifled by an order for security is not made out. Stifling will only occur if the two US third parties choose to decline any request to provide the necessary finance. If they so decline, then fairness to the defendant dictates that this claim should not proceed to trial. In that event, any stifling will be the product of the failure of the two parties who stand to gain from the success of this litigation to back it financially.

79. I will therefore order security for costs. Subject to any further submissions, I should reduce the amount of the security sought by the amount of the costs of the security application (and thus to £46,736.10). I should also reduce the amount further to reflect the fact that not all of the sums sought are likely to be recoverable on assessment. Subject to any further representations, the figure I have in mind is £40,000.

V: *Disposal*

80. In summary, therefore:

(1) I dismiss the application to strike out the claim form and particulars of claim as manifestly ill-founded.

(2) I dismiss the application for summary judgment in favour of the claimant on the footing that there is a triable issue, with real prospects of success, that clause 32 fails to satisfy the requirement of reasonableness in s. 3 of UCTA.

(3) I venture no definitive view on whether the losses claimed from the defendant constitute “*indirect or consequential loss*” for the purposes of that clause.

(4) I order the claimant to provide security for costs up to the costs and case management hearing in the VAT-exclusive sum of £40,000.

81. I invite the parties to seek to agree a substantive order to give effect to this judgment. This should include provision for the costs of the application. If the parties cannot agree on a suitable form of order, they should provide a draft composite order, together with brief written submissions on the outstanding consequential matters, which should be no longer than strictly necessary, and, in any event, no longer than five pages in length. Unless I direct otherwise, I will proceed to determine the outstanding matters on paper.

82. I propose formally to hand down this judgment remotely at 10.00 am on Friday 3 May 2024. No attendance is required. I will extend the time for appealing to 42 days after formal hand down (i.e. to 4.00 pm on Friday 14 June 2024). I direct that written submissions in support of any application for permission to appeal, with concise draft grounds of appeal, are to be filed and served within 14 days after hand down (i.e. by 4.00 pm on 17 May 2024). Unless I direct otherwise, I will determine any such application on paper.

83. That concludes this reserved judgment.