



Neutral Citation Number: [2024] EWCA Civ 1293

Case No: CA-2024-000569

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**KINGS BENCH DIVISION**  
**COMMERCIAL COURT**  
**Mr Justice Foxton**  
**CL-2022-000082**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29/10/2024

**Before:**

**LORD JUSTICE LEWISON**  
**LORD JUSTICE STUART-SMITH**  
and  
**LORD JUSTICE ZACAROLI**

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**Between:**

**PARSDOME HOLDINGS LIMITED**

**Claimant/  
Appellant**

**- and -**

**PLASTIC ENERGY GLOBAL S.L.**

**Defendant/  
Respondent**

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**MR M E ROJAS** (director of the Appellant) appeared in person by CVP Link  
**TONY SINCLA KC and VANSHAJ JAIN** (instructed by **Herbert Smith Freehills**) for the  
**Respondent**

Hearing date : 22 October 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 29 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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**Lord Justice Zacaroli:**

1. This appeal from the order of Foxton J dated 14 February 2024 raises a short point as to the time at which an order requiring payment into court as security for costs is to be treated as satisfied. It arises in the following circumstances.
2. At the hearing of the appeal we announced our decision to dismiss the appeal, with reasons to follow. These are my reasons.
3. The claimant (and appellant) Parsdome Holdings Ltd (“Parsdome”) commenced proceedings against the defendant (and respondent) Plastic Energy Global S.L. (“Plastic Energy”) in November 2021, alleging that Plastic Energy induced it to enter into a deed of novation of a convertible loan agreement by fraudulent misrepresentations.
4. Parsdome is incorporated in the British Virgin Islands. Its owner and director is Mr Matias Rojas (“Mr Rojas”). It has not provided details of its financial position, but – as the judge noted – by 2023 it appeared that its financial position was becoming more challenging, a conclusion reinforced by its solicitors coming off the record in January 2024 and Mr Rojas’ confirmation to the judge that financial pressures led him to seek to meet the court’s orders for security for costs rather than continue to incur legal expenses.
5. Orders (by consent) were made against Parsdome for the provision of security for costs in 2022, which were complied with. The current issue arises out of two orders for security for costs made in late 2023 and early 2024.
6. The first is an order of Andrew Baker J dated 10 November 2023 (the “Baker J Order”). This required Parsdome to “provide security for the Defendant’s costs for the period up to and including exchange of witness statements by paying the sum of £343,000 into the Court Funds Office or by providing a first-class London bank guarantee in the same amount”, by 5 December 2023.
7. Parsdome sought to comply with the Baker J Order by sending a cheque to the Court Funds Office (the “CFO”), but it breached the order in four respects. First, the cheque was received after the deadline. Second, the cheque was for a sum in US dollars, not sterling as required by the order. Third, it was for the wrong amount. Fourth, as it was rejected by the CFO, no payment was ever made by this cheque as it never cleared.
8. The second is an order of Calver J, sealed on 15 January 2024 (the “Calver J Order”). Plastic Energy, while reserving its rights in respect of the breaches of the Baker J Order, agreed the terms of a consent order with Parsdome, to permit payment of the security by cheque in a foreign currency, and to increase the amount of security. This was to cater for the work that Plastic Energy’s legal team was required to do in preparation for the trial due to commence on 26 February 2024. The terms of the consent order took a while to be agreed (largely due to delays in Parsdome’s solicitors obtaining instructions from Mr Rojas). The Calver J Order required payment of a further sum of £939,500 to provide security for Plastic Energy’s costs up to and including trial. By paragraph 3, Parsdome was required to satisfy both the security ordered by Baker J and the further security, “by way of a payment of an equivalent sum of £1,282,500 into the [CFO] (whether by way of cheque or bank transfer) by 4pm (UK) on the date 7 days after the date on which the Court seals this Order and provides the same to the Claimant’s

solicitors”. That date was, in the event, 22 January 2024. The order also provided that Parsdome was permitted to make the payment in a foreign currency (US dollars).

9. The evidence before Foxton J indicated that Parsdome breached the Calver J Order in that, as the CFO had confirmed, no cheque was received by it at all. It is unclear why this was. In any event, as the cheque was only posted from Guatemala on 22 January 2024, it could never have been received by the CFO (even if it had not gone missing) by the deadline. In addition, the Form 100 supplied by Parsdome was rejected by the CFO, because it did not contain a “wet” signature.
10. On 5 February 2024, in view of these breaches, Plastic Energy issued an application to strike out the claim, pursuant to CPR 3.4(2)(c).
11. On 13 February 2024, Mr Rojas submitted a “position statement”, in which he proposed a “constructive solution”. This involved cancelling the cheque sent on 22 January 2024, and issuing a new cheque (which he had already requested to happen) to be sent from Guatemala to his address in London, so that he could forward it with the accompanying documents to the CFO.
12. On the morning of 14 February 2024, Mr Rojas emailed the court, enclosing a photo of a re-issued cheque, together with a photo of the DHL envelope within which it was sent, both dated 13 February 2024. He indicated that this would be received at his London address on 16 February, and that he would then courier it to the CFO.
13. Before Foxton J on 14 February 2024, at which point the trial was due to start in 12 days time, no cleared funds had been received. Parsdome had provided no evidence that there were sufficient funds in the bank account on which the cheque had been drawn. The best that Mr Rojas was able to say to Foxton J was that the CFO had indicated that it may take six to eight weeks for the cheque to clear, assuming there were funds in the account.
14. In addition, Parsdome had failed to pay the trial fee (which itself would lead to the trial being struck out under CPR 3.7A1(7)).
15. In addressing Plastic Energy’s application, Foxton J applied the three-stage test from *Denton v T H White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926: (1) was the breach serious? (2) was there a reasonable excuse? (3) would it be just, in all the circumstances, to impose a sanction for breach? To that he added the further consideration, since it was an application to strike-out, whether doing so would be proportionate.
16. He concluded that the breaches were serious. It was two months since the Baker J Order, and 12 days before the start of trial, but no security had been provided at all. In reaching this conclusion, he took into account that, in his assessment, payment into the CFO requires cleared funds, not merely the presentation of a cheque which may take a long time to clear, or which may never clear. He concluded that there was no satisfactory excuse and that it would be unjust, in the circumstances, to impose no sanction. He declined, however, to strike out the claim immediately. Instead, he gave Parsdome a brief opportunity to comply, ordering that unless it provided security – by way of cleared funds paid to the CFO – by 4pm on 20 February 2024, the action would be struck out.

17. Shortly after the hearing on 14 February 2024, however, Mr Rojas brought to Foxton J's attention the decision of the Court of Appeal in *ENE Kos I Ltd v Petroleo Brasileiro SA* [2009] EWCA Civ 1127 ("*ENE Kos*"). In that case it was held that (1) payment by cheque is made at all only if cleared funds are received by the payee; but (2) the effective date for payment of a cheque in purported compliance with an order to pay funds into court is the date on which the cheque is received by the CFO, and not the date on which cleared funds are received.
18. Foxton J acknowledged that, in light of that decision, which was neither cited to him nor referred to in the White Book, part of his reasoning for making the order of 14 February 2024 was wrong.
19. He noted, however, that (in contrast to the facts of this case) in *ENE Kos* the cheque was drawn on an account of London solicitors who confirmed they had already been put in funds by their client, and that the cheque had cleared before the issue of alleged non-compliance came before the court.
20. He also noted the observations of Arden LJ in *ENE Kos* (at §51-54) to the effect that the circumstances of a particular case may make it just for the court to craft a special form of order, such as requiring cleared funds to be received by a particular date. One such circumstance which she envisaged was an order to pay money into court for security for costs, where it would be unfair to the opposing party to require them to incur substantial costs at a time when the cheque by which payment into court was made was in the process of being cleared. That, Foxton J noted, was exactly the position before him. Plastic Energy would have been required to incur substantial costs in the immediate pre-trial period for a trial starting in a matter of days, without any security because the cheque by which the security was purportedly paid would not clear, if at all, until after the trial.
21. In those circumstances, he concluded that his order of 14 February 2024 was the only order which met the justice of the case. He therefore refused to stay the order. He delayed consideration of permission to appeal until after the deadline had passed for the receipt of cleared funds. He directed Parsdome to provide evidence confirming (1) the availability of funds in the account on which any cheque was drawn; (2) the time it would take for the cheque to clear; and (3) why funds could not be transferred with a value date of 20 February 2024.
22. Parsdome filed evidence on 20 February 2024 consisting of a letter from a Mr Figueroa, the chief financial officer of Corporation Arcenillas S.A. (the company on whose account the cheque was drawn). Mr Figueroa confirmed that there were sufficient funds in the bank account to meet the cheque, and provided a copy of untranslated financial statements of the company for the year ended 31 December 2022. No bank statement was provided, and no explanation was given for why cleared funds could not have been provided by the deadline in the order of 14 February 2024.
23. As Foxton J noted in a short further ruling on 21 February 2024, Parsdome had not complied with the order of 14 February 2024, whether by providing payment or providing satisfactory evidence of funds. He nevertheless granted permission to appeal, both on the basis of a real prospect of success and because there was some other compelling reason for an appeal, to resolve an issue of general importance.

24. The cheque dated 13 February 2024 never cleared. Mr Rojas wrote to the CFO on 26 February 2024, asking them to stop processing the cheque and telling them that he would cancel it.

Grounds of appeal

25. Parsdome raises three grounds of appeal:
- (1) The judge’s interpretation of the Calver J Order – that it required cleared funds to be paid into the CFO by 22 January 2024 – was wrong;
  - (2) The judge was wrong to change the nature of the requirement for security for costs, which had been agreed to in the consent order of Calver J; and
  - (3) Taking into account the true nature of the breach of the Calver J Order – being a lost cheque – and the fact that it was purged within days, the decision to strike out was disproportionate.
26. By a respondent’s notice, Plastic Energy seeks to uphold Foxton J’s order on the additional grounds that:
- (1) Even on the basis of the *ENE Kos* decision, it was necessary both that the cheque was received within the deadline *and* that the funds must eventually clear. The cheque presented in purported compliance with the Baker J Order never cleared (but was rejected as noted above) and no cheque was received within the deadline or at all in respect of the Calver J Order. Moreover, the CFO did not receive – and has never received – cleared funds on either occasion.
  - (2) Foxton J’s decision to define payment as receipt of cleared funds was permissible in the circumstances of this case, as observed by Arden LJ in *ENE Kos*.

The decision in *ENE Kos*

27. I deal first with this decision, given its importance to Parsdome’s appeal. By an order dated 13 February 2009, Field J declined to grant summary judgment to the claimant on the “strict terms” that the defendant pay into court the sum of \$500,000 by 5pm on 27 February 2009. The claimant purported to comply with that order by lodging a cheque by the deadline, drawn on their solicitor’s client account, the solicitors having confirmed that they had been put in funds by their client. The claimant restored the application for summary judgment, contending that the defendant had failed to comply with the terms of Field J’s order because cleared funds had not been received by the deadline. Field J agreed, concluding that the true meaning and effect of the condition in his earlier order was that cleared funds must be received by 27 February 2009.
28. The Court of Appeal overturned that decision, holding that on the true construction of Field J’s order, the payment was to be made by whatever time was prescribed by the relevant rules. By Practice Direction 37, a party was entitled to make a payment into court by cheque. Funds in court were regulated by the Court Fund Rules 1987 (made under s.38 of the Administration of Justice Act 1982). By Rule 16(6)(ii) the effective date for lodgment of money was, in the case of a cheque or instrument other than a banker’s draft, the date of its receipt in the Court Funds Office or such later date as the

Accountant General may determine. That Rule, said Dyson LJ (with whom Arden LJ and Waller LJ agreed) was clear and unequivocal.

29. Dyson LJ provided two additional reasons for this conclusion. First, there was good reason for saying that the effective date of lodgment was the date of the receipt of the cheque, because it was important that there should be certainty as to the effective date of lodgment. The requisite certainty would be lacking if the effective date depended on the clearance of the funds (which lay outside the control of the paying party).
30. Second, it was consistent with the general law as to the effective date of payment where payment is made by cheque. It has long been the law that a cheque paid in respect of a pre-existing debt is subject to a condition subsequent, and that on the condition being performed by actual payment (i.e. when the cheque clears), payment relates back to the time when the cheque was given: see, e.g., *Marreco v Richardson* [1908] 2 KB 484, per Farwell LJ at p.593, cited at §30 of Dyson LJ's judgment in *ENE Kos*.
31. On that basis, Dyson LJ concluded (at §31-33) that, by analogy with the position in contract, the lodging of a cheque before the deadline for payment operated as a conditional payment, with the condition being satisfied if the cheque was subsequently honoured. Accordingly, "...if para 1 of the order of 13 February had required a payment into court of £X by 17:00 hrs on 27 February, the lodging of a cheque for £X before the time on that date would have complied with the terms of the order if the funds were eventually cleared."

#### Issues for determination on this appeal

32. None of the three cheques provided by Parsdome ever cleared. On the basis of the *ENE Kos* decision, therefore, no payment has ever been received pursuant to the various orders of the commercial court judges in this case.
33. In order to address the issues raised by Parsdome's appeal, however, it is necessary to examine matters a little more closely, and from the perspective of the judge on 14 February 2024.
34. I approach the issues to which this appeal gives rise in the following order:
  - (1) Did the Calver J Order require Parsdome to provide payment – in the form of cleared funds – by 22 January 2024?
  - (2) If not, was Foxton J nevertheless entitled to make the order he did on 14 February 2024? That involves determining:
    - (i) whether it is permissible for the court, in ordering the payment of security for costs, to specify that it requires cleared funds to be received by the CFO by a specified date; and
    - (ii) if so, whether Foxton J's decision to do so can be upheld notwithstanding his error in concluding that the Calver J Order required cleared funds to have been received by 22 January 2024.

Did the Calver J Order require cleared funds to be provided by 22 January 2024?

35. As Foxton J acknowledged in giving permission to appeal, the decision in *ENE Kos* suggests that an order requiring only that payment be made to the CFO by a specified date, and which permits payment to be made by cheque, does not require cleared funds to be received by the specified date.
36. The primary reason for the decision in *ENE Kos*, however, no longer applies. The Court Fund Rules 2007 have been replaced with the Court Fund Rules 2011, in which there is no equivalent to Rule 16(6)(ii). There is therefore no express provision in the rules relating to payment into court to the effect that an order permitting payment into court by cheque is complied with when the cheque is received by the CFO.
37. Nevertheless, the supporting reasons provided by the Court of Appeal in *ENE Kos*, in particular by reference to the general law relating to payment by cheque, compel the conclusion that an order requiring payment in by a certain date, and which permits the payment to be made by cheque, without more, is complied with if the cheque is received by the CFO by the deadline *and* the cheque subsequently clears. It follows that if, at the time the matter comes before a court it remains possible that the cheque could clear, it is wrong to conclude that there has been a failure to comply with the order for payment in by the deadline on the ground that cleared funds were not received by that date.
38. That is also supported by the fact that, since the failure to comply with an order for security for costs, even if not made on an “unless” basis, can have serious consequences, it is important that the obligations on the paying party are clearly stated in the order. An order requiring or permitting payment by cheque by the specified date, without more, does not sufficiently clearly identify that the cheque must clear by the specified date.
39. While that part of Foxton J’s reasoning cannot stand, for reasons set out below I am nevertheless satisfied that the order he made on 14 February 2024 was one which he was fully entitled to make.

Is it permissible for a court to specify that an order permitting payment into court by cheque shall be satisfied only if cleared funds are received by the deadline?

40. By CPR Rule 25.12(3), “Where the court makes an order for security for costs it will ... (b) direct (i) the manner in which; and (ii) the time within which the security must be given.”
41. The majority of the Court of Appeal in *ENE Kos* did not endorse Arden LJ’s observations to the effect that it was open to a court to make an order which specified that an order requiring payment into court by a certain date would only be satisfied, in the case of payment by cheque, if cleared funds were received by that date. Instead, they considered that it was something that might be considered by the Civil Procedure Rules Committee.
42. The majority’s position is understandable given that the point had not been argued in front of them, and in the face of the clear wording of Rule 16(6)(ii) of the Court Fund Rules 2007. That provision does not, however, appear in the current rules.
43. There is no reason in principle why the court, in directing the manner in which, and the time within which, security is to be given, cannot order that a payment into court must

result in cleared funds being received by the CFO within the deadline. That is particularly so where time is of the essence. It is only upon the receipt of cleared funds that security is provided: until then, the other party will continue to incur costs in the action, at risk that they will not be paid.

44. It is true that this may mean, where the paying party chooses to comply with the order by payment by cheque, that the satisfaction of the order lies beyond its control. It is always open to the paying party, however, to comply with the order by means, such as bank transfer, which provide greater certainty as to the receipt of cleared funds. Any remaining uncertainty for the paying party is outweighed by the need for the other party to have the certainty of being secured before incurring the relevant costs. Arden LJ made the same point at §51 of *ENE Kos*.
45. Parsdome contends that it was nevertheless wrong for the judge to change the terms of the agreement reached between the parties, reflected in the Calver J Order. Mr Rojas submitted that Plastic Energy, a sophisticated party with professional representation, had expressly agreed to an order which could be complied with by provision of a cheque by 22 January 2024 notwithstanding that it might not clear for a further eight weeks, by which time the trial would be over. He submitted that while this left Plastic Energy financially exposed, they had freely agreed to this. He characterised their position by February 2024 as “buyer’s remorse”, and submitted that it had not been open to Foxton J to change the fundamental bargain reached between the parties.
46. I reject that contention. Whether or not it would have been open to Plastic Energy to apply to vary the Calver J Order if a cheque *had* been lodged with the CFO by 22 January 2024, once Plastic Energy discovered that the cheque would not clear for a further six to eight weeks, the fact is that Parsdome chose to wait until the date the cheque was due to be lodged with the CFO before posting it from Guatemala. That was a clear breach of the order, irrespective of the fact that the cheque never arrived.
47. Whatever agreement had led to the Calver J Order, there was nothing to prevent Foxton J fashioning a different form of order to deal with the circumstances which now faced him.

Was Foxton J entitled to make the order of 14 February 2024, notwithstanding the error as to the meaning of the Calver J Order?

48. This aspect of the appeal (which encompasses the ground that the order was disproportionate) faces the hurdle that it is an appeal against a case management decision. It is well established that it would be inappropriate for an appellate court to reverse or interfere with such a decision unless it is “plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree”: *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743, per Lewison LJ at §51.
49. Parsdome contends that, once it is understood that it was not a breach of the Calver J Order to fail to provide cleared funds by 22 January 2024, so that the breach was an “involuntary” one “purged within days”, it was disproportionate to order the claim to be struck out unless cleared funds were provided by 20 February 2024.



50. I disagree. In view of the circumstances facing Foxton J at the hearing on 14 February 2024, he was fully entitled to make the order he did. There was a clear breach of the Calver J Order, aside from anything else, in leaving it until 22 January 2024 to post a cheque from Guatemala. The cheque which Parsdome had provided in response to the Baker J Order had similarly been sent too late to arrive by the deadline. The rejection of that cheque by the CFO meant that, even on the basis of the decision in *ENE Kos*, there had been no payment at all in response to the Baker J Order. Three months had now passed since that order, but no security had been provided in response to it. Parsdome had again waited until the last minute before the hearing on 14 February 2024 to attempt to rectify the breach of the Calver J Order, and then did so by issuing a further cheque in the knowledge that it would take many weeks to clear. It was now only twelve days until trial and, notwithstanding Plastic Energy's efforts to obtain security, they remained wholly unsecured for the costs they were incurring in preparing for the trial. No evidence was provided to the court to satisfy it that there were funds in the account on which the cheques had been drawn to ensure that the most recent cheque (dated 13 February 2024) would clear.
51. In those circumstances, not only was the order of 14 February 2024 one which Foxton J was entitled to make, it was – as he noted in his ruling of 16 February 2024 – the only order which met the justice of the case.

**Lord Justice Stuart-Smith**

52. I agree.

**Lord Justice Lewison**

53. I also agree.