



Neutral Citation Number: [2024] EWHC 1990 (Comm)

Case No: LM-2022-000242

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31/07/2024

Before :

Paul Stanley KC
(sitting as a Deputy High Court Judge)

Between :

J ROBBINS CAPITAL PARTNERS LIMITED

Claimant

- and -

(1) ZAMSORT LIMITED
(2) ORTAC RESOURCES (UK) LIMITED
(3) ARC MINERALS LIMITED

Defendants

Mr Jagjit Robin Singh, director, made representations on behalf of the **Claimant**
The **First Defendant** did not appear and was not represented
Mr James Stuart (instructed by **Hill Dickinson LLP**) for the **Second and Third**
Defendants

Hearing dates: 19 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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PAUL STANLEY KC:

Introduction

1. Although this claim was issued in February 2021, it has not progressed to effective close of pleadings. At this hearing, there were two applications before me. The first, by the claimant, is an application to amend its particulars of claim. That application has a long and chequered history. But it is unnecessary to recount the details. The second and third defendants do not oppose the amendments as such, but argue that they should be allowed subject to conditions. The main, and controversial, condition is that they say the amendments should not be permitted until the claimant has paid certain outstanding costs orders. The other application is by the second and third defendants, who seek to have the claim stayed until such time as those costs orders are paid. The condition sought and the stay are part of essentially the same debate—indeed, if I impose the stay, the condition is effectively redundant. I therefore heard argument largely about the stay.
2. The detail of the claim itself is not important for present purposes. At its heart, it alleges that the claimant acted as an introducer between the first defendant, which had potentially lucrative copper concessions in Zambia but needed assistance to monetize them, and the second and third defendants. The claimant alleges that having made the introduction, it was frozen out of the subsequent dealings between the parties in order to be deprived of the fees that it should have earned. It claims damages for breach of contract or associated tortious claims (put at around £24 million), an account of profits, and exemplary damages. Mr Stuart, who appeared for the second and third defendants criticized its substance and quantum. But I have not been asked to determine it summarily, and I proceed on the assumption that the claimant has an arguable claim for substantial damages.
3. The relevant costs orders that have not been paid, including two orders made on 22 March 2024, now total somewhat over £60,000.
4. I have decided that I will not exercise my discretion to order the proceedings to be stayed, or to impose any condition upon amendment. This is mostly because I am satisfied on the evidence, on a balance of probabilities, that the claimant does not have, and cannot raise, the money required to pay the orders, so that the grant of a stay would effectively stifle the claim. I describe my reasons in more detail below.

The law

5. Various cases address the question of how the court should respond to failures to discharge costs orders that are payable, either following summary assessment or as interim payment orders.
6. Until the introduction of the civil procedure rules following Lord Woolf's report on Access to Justice in the late 1990s, the usual practice in the High Court when an interlocutory application was heard was to make orders that would determine the incidence of costs arising from the application in question, but not immediate orders for assessment or payment. Instead, payment awaited the end of the case, and the taxation (as costs assessment was then called) of the costs of the whole action. The

civil justice reforms introduced, or encouraged the wider adoption of, a “pay as you go” regime, in which costs would be assessed and paid as applications were heard. Often that assessment is summary, and usually accompanied by an order for the immediate payment of the sum assessed. Where summary assessment is not fair or practical, it is routine practice to order interim payments on account of costs.

7. In *Crystal Decisions UK Ltd v Vedatech Corp* [2008] EWCA Civ 848, Chadwick LJ (with whom Laws LJ agreed), in dismissing an application for permission to appeal, emphasised the importance of orders for the immediate payment of costs, saying this (at [17]):

“The court’s ability to make interlocutory costs orders following, in particular, the Access to Justice reforms in 1998, is a sanction which is available to it in order to encourage responsible litigation. The court marks what it regards as an irresponsible application by an immediate order for the payment of costs. That is intended to bring home to a party—when considering whether to make an application—that an unsuccessful application may carry a price which will have to be paid at once. If the court is not in a position to enforce immediate interlocutory orders for the payment of costs which it was thought right to make, then the force of that sanction is seriously undermined.”

8. Chadwick LJ’s description of costs orders as a “sanction” imposed to “mark” what the court regards as an “irresponsible application” might have been influenced by the particular facts of the case before him. But it is not universally apposite. There are systems where the award of costs depends upon judicial disapproval of a party’s conduct, for example in the Employment Tribunal under the Employment Tribunals Rules of Procedure, rule 76, or in many cases in the Upper Tribunal under the Tribunal Procedure (Upper Tribunal) Rules, rule 10(3)(d). But, in the High Court, although conduct is a relevant factor (CPR 44.2(4)), the general rule is that the unsuccessful party should pay the successful party’s costs (CPR 44.2(2)). That applies even if the unsuccessful party acted entirely properly and reasonably. Take, for instance, a litigant who wins at first instance and then loses by a majority in the Court of Appeal. It could hardly be said that a case which convinced two professional judges was “irresponsible”; but costs will still probably follow the event. In this sense, it seems wrong to describe individual costs orders, generally, as a “sanction” imposed on “irresponsible” conduct, though they may occasionally be so. Mr Stuart suggested that an order for immediate payment carries some overtone of sanction and disapproval. I do not agree. Such orders are the norm.
9. I make this point because I think it would be wrong to approach an application such as this on the assumption that the costs order itself necessarily shows that the party against whom it has been made is a “bad actor” with a proven track record of misusing the court’s procedures. Sometimes it may. But the mere fact that a costs order has been made does not itself provide such an indication. Nor, in my view, is it strictly correct to regard costs as a “sanction” or the party who has not paid as seeking relief from sanction, though no doubt some of the factors relevant to the grant of such relief will also be relevant to the court’s exercise of its discretion, and they have sometimes been referred to in the cases: see, e.g., *Peak Hotels and Resorts Ltd v*

Tarek Investments Ltd [2016] EWHC 690 (Ch) at [23] (Asplin J) and *Aramco Trading Fujairah FZE v Gulf Petrochem FZC* [2021] EWHC 2650 (Comm) at [20]–[21] (HHJ Pelling KC).

10. But my hesitation in that regard does not undermine the essential force of Chadwick LJ's comments, understood as identifying one of the objectives that the *system* pursues. The rules and practice about costs serve two functions. First, by placing parties at risk of paying costs whenever they lose (normally promptly after the application is decided) they concentrate the mind. They encourage parties and their advisers to weigh carefully the merits of making or resisting applications. They deter applications which are designed simply to harass, or which are of marginal benefit. This purpose, to which Chadwick LJ alluded, does not depend on the court forming any view that a party's conduct has been improper or unreasonable on a particular occasion; it is systematic. The general rule provides a useful incentive, without the need to decide on a case-by-case basis whether any particular application was "irresponsible". Secondly, the rules reflect a policy that since applications involve cost, it is on balance fairer that the reasonable and proportionate costs of an application should be met by whoever turns out to have been (however excusably) wrong. That imposes a quasi-strict (though discretionary) liability for doing something entirely proper: invoking the court's jurisdiction to decide a dispute. Not every common law system makes the same value judgment (the USA, notably, usually does not), and even English law sometimes takes a different view (as the Employment Tribunal and Upper Tribunal Rules show). But it is firmly entrenched in our common law courts when dealing with higher value claims.
11. Those policy objectives are both supported by the modern practice of requiring costs to be paid soon after they are incurred. People will think harder about the merits of prospective action if they expect to feel them in their pocket quickly, not years later. And there is no reason why someone who is entitled to money should be left waiting for it, sometimes for years, as used to happen. Chadwick LJ was clearly right, therefore, to identify prompt payment as a significant part of a considered regime that serves legitimate and important purposes. It follows that the court will consider how best to deploy its powers to make those orders effective. As HHJ Birss QC (as he then was) put it in *Musion Systems v Activ8-3D* [2012] EWPC 5 at [24], "[i]f the court is not in a position to enforce interlocutory costs orders the force of the sanction is seriously undermined".
12. This takes one to the second principle. One possible approach would have been to say that the court's active role ends once the costs order is made. It would simply leave it to the party which has the benefit of the costs order to enforce it as a debt, letting that process unfold in parallel to, but not as part of, the proceedings in which the order was made. Authority makes it clear, however, that that is not the correct approach. There are various reasons for that. Those processes, especially for the recovery of relatively small sums, can be expensive, ineffective, and slow. They entail satellite litigation which is usually to be avoided. Besides that, we do not lightly accept, for obvious reasons of basic fairness, that litigants be free to choose which of the civil procedure rules they comply with. The court would risk looking ridiculous if it were willing to allow a litigant to flout orders that it has made in a case without any consequence in that case. Accordingly, the court will use its inherent jurisdiction (which I understand to include its general case management powers) to prevent such conduct. See *Crystal*

Decisions UK Limited v Vedatech Corp [2006] EWHC 3500 (Ch) at [9]–[11] (Patten J). Such decisions are, in their nature, discretionary, as the Court of Appeal confirmed in *Vedatech* at [19]; see also *Michael Wilson Partners Ltd v Sinclair* [2017] EWHC 2424 (Comm) at [29(1)] (Sir Richard Field). They depend on all the circumstances of the case.

13. One aspect of the discretion is that the court should consider the full range of possible options: see *Musion Systems* at [24]. Options for enforcement outside the action itself include the usual procedures for enforcement of judgment debts. Options within the action include striking out a claim or defence (as was sought in *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2016] EWHC 690 (Ch) and *Musion Systems*), debarring a defendant from defending (as in *Crystal v Vedatech* and *Michael Wilson & Partners Ltd*), staying a claim until costs are paid (*Siddiqi v Aidiniantz* [2020] EWHC 699 (QB)). They would also include imposing conditions upon steps the court would otherwise permit a party to take, such as serving an amended pleading. Nevertheless, as Sir Richard Field pointed out in *Michael Wilson & Partners Ltd*, at [29(6)], if the court does decide to make an order such as striking out a claim or debarring a defendant from defending, it will usually make it in “unless” form, thereby giving the party an opportunity to remedy its non-compliance (see also *Exporien Mining Private Ltd Co v Aggreko International Projects* [2024] EWHC 1463 (Comm) at [24]).
14. Many first instance decisions contain statements that in the case of an unexcused failure to pay (a “won’t pay” rather than a “can’t pay” case) the normal or default approach will be to make an order of this sort. That seems to have been the view of Patten J in *Crystal* [2006] EWHC 3500 (Ch) at [16], and of Saini J in *Siddiqi* at [30(ii)], where he said:

“... the ‘working’ or ‘default rule’ is that a litigant should not be able to continue with his or her claim without satisfying an existing and non- appealed final costs order, and the court should impose a condition requiring compliance.”

It also chimes with Sir Richard Field’s observation in *Michael Wilson and Partners Ltd*, at [29(5)] that

“Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.”

To similar effect, in *Aramco*, HHJ Pelling KC quoted a remark by Lord Neuberger that “Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have”: at [23], quoting *Al-Saud v. Apex Global Management Ltd* [2014] UKSC 64, [2014] 1 WLR 4495 at [23]. See also *Khokan v Nirjhor* [2024] EWHC 1872 (KB) at [82] (Hill J) (“normal consequence of a failure to comply with an immediate costs order ... is that compliance is a condition of being able to continue with the litigation”).

15. Such comments were not, I think, intended to state a rigid rule of law, and I note that in *Crystal* on appeal, Chadwick LJ questioned the generality of what Patten J had said. The court always exercises a discretion. But it exercises that discretion on principle. So it can normally be expected—given the important objectives that orders for payment of costs serve and of court orders being complied with—that wilful disobedience will have tangible consequences. That is why Saini J described this as a working or default rule. It is a practical prediction of where the balance will in many cases fall.
16. However, in the real world, not every failure to comply with a mandatory order can squarely be described as “disobedience”. What of the litigant who, although ordered to pay, simply does not have the resources to do so? As the cases consistently recognise, the routine enforcement of costs orders by case-determinative sanctions in those circumstances would be open to objection, both under Article 6 of the ECHR which provides that “[i]n the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time”, and because the right of access to civil justice forms a basic part of the common law constitutional settlement: see, e.g., *R v Secretary of State for the Home Department ex parte Leech (No 2)* [1994] QB 198 (CA), 210 (Steyn LJ), *R v Lord Chancellor ex parte Witham* [1998] QB 598 (DC), 586 (Laws J). Like Saini J in *Siddiqi*, I shall refer to Article 6 alone, but understanding it to encompass also the central importance that the common law attaches to the citizen’s right to adjudication.
17. The right of access to the court is not, however, unqualified. Rules which serve legitimate aims—as the costs rules do—are not *ipso facto* incompatible with the right of access to civil justice. But it is critical that they operate in a way that is proportionate (in the Convention sense) and does not impair the very essence of the right. It has been consistently recognised that in deciding whether to enforce a costs order by restricting a party’s ability to prosecute or defend a claim, the court must consider whether that is proportionate in all the circumstances. It has also been consistently recognised that it is unlikely to be proportionate if the party’s failure to comply with the costs order is involuntary, because the party has no means to meet the order. This was recognised by Chadwick LJ in *Crystal* at [18] (“orders requiring payment of costs as a condition of proceeding with litigation are not made in circumstances where to enforce such an order would drive a party from access to justice”); by Sir Richard Field in *Wilson & Partners Ltd* at [29(3)]; by Saini J in *Siddiqi* at [30 (iii)] (“if a claimant can show his or her Article 6 rights will be interfered with by such a condition (because they cannot pay, and a genuine claim will therefore be stifled) that is a material, but not conclusive, consideration pointing against such a condition”); and by HHJ Birss QC in *Musion* at [24(ii)].
18. The reasons are clear. To strike out a (potentially valid) claim for several million pounds because the claimant does not have cash flow sufficient to meet a present liability for a few tens of thousands, risks being disproportionate. It might turn out that at the very time the claimant is not paying the defendant its tens of thousands, the defendant is not paying the claimant the millions that it owes. Whether that is so or not cannot of course be known until the case is tried. But obtaining such a determination is the very essence of the Article 6 right, and if the claimant really cannot meet the costs liability immediately, striking out the claim (or taking action which will or may achieve the same result) and foreclosing the determination of that

very issue is seriously problematic. It enforces one liability that happens to be simple enough to have been summarily decided without permitting consideration of a related one that is not.

19. In this respect, however, the cases show a keen awareness that it is not sufficient for the affected person simply to assert that payment is difficult or impossible. Nor is the question simply whether that person has the means to meet the payment from his or her own resources. In this respect, several judges have drawn an analogy to the position in relation to security for costs and conditional orders, and to the comments made by Lord Diplock in *MV Yorke Motors v Edwards* [1982] 1 WLR 444 in relation to the use of the power to impose conditions on a marginal defence. Lord Diplock pointed out that when considering a party's "means" the relevant question is not simply his own personal property, but his ability to raise money to meet a condition or order. He quoted with approval what Brandon LJ had said when deciding the case in the Court of Appeal:

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

20. In *Goldtrail Travel Ltd v Onur Air Taşımacılık AŞ* [2017] UKSC 15, [2007] 1 WLR 3014, the Supreme Court was considering whether an appellant should be required to provide security for an appeal. The appellant argued that the order should not be made because to do so would stifle its appeal. At [13], Lord Wilson noted that this was one of a number of situations in which a party might contend that its access to the court to determine a prima facie arguable claim might be "stifled", including "a party who has without good reason failed to comply with an order". It is plain that, despite the differences between these situations, Lord Wilson considered that the same principles apply.
21. Lord Wilson noted that any contention that an order would have a stifling effect is one that needs to be established by the party claiming to be stifled, and that it needs to be established "on the balance of probabilities": [15]. It should not, I think, be supposed that this means that it must be established as a certainty. As Mr Robin Singh submitted, there is always a possibility that "something might turn up". He used the example of a lucky Euromillions win. What Lord Wilson meant, as I understand it, is that it is not enough to say that compliance with the condition will be troublesome, or that it might turn out to be impossible. It needs to be shown that looked at realistically it is more likely that the party will be unable to comply with the condition than that he or she will, despite making good faith efforts to do so.
22. Lord Wilson also confirmed (as *MV Yorke Motors* made clear) that stifling is not a matter of examining simply the litigant's present resources, but also those that might be raised. The burden in this respect remains on the party that is contending that its action or appeal will be stifled. See also *Responsible Development for Abaco (RDA) Ltd v Christie* [2023] UKPC 2, [2023] 4 WLR 47 at [67]. As Lord Wilson ultimately formulated the question (at [23]) it was as follows:

"Has the appellant company established on the balance of probabilities that no such funds would be made available to it,

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

23. The references to the company’s “owner or ... closely associated person” should be noted. Although the court is rightly demanding in this context, it must remain realistic. There will often be some person or group of people (such as a shareholder, creditors of an insolvent company, a trustee) who are obvious candidates to provide financial support. It will be necessary to consider them specifically, and with an appropriate degree of realistic scepticism, as Lord Wilson pointed out in *Goldtrail* at [24]. But a party cannot be expected to go person-by-person through the entire world population, or to exhaust remote possibilities. Moreover, I do not think that in the modern world the court will be too ready to assume that litigants will be able to call upon (or that it would normally be reasonable to expect them to call upon) a large group of “friends ... relatives, who can help him in his hour of need” to the tune of many thousands of pounds. The balance of probabilities again cuts both ways: it does not require a party to exhaust every avenue of support, however remote or theoretical.
24. Thirdly, however, the court does expect the evidence adduced in support of an argument that an order will stifle the claim to be detailed and specific. As Sir Richard Field put it in *Michael Wilson & Partners Ltd* at [29(4)], the evidence must be “detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability”. See also *Goldtrail* at [24].
25. Of course, it should never be forgotten that at the end of the day, these are all (albeit well-established) guidelines for the exercise of a discretion. As Saini J pointed out in *Siddiqi* at [30(iv)] “the Court must take into account all other circumstances of the case, including the procedural behaviour of the defaulting party in deciding on the just order to make.” I doubt that Saini J meant to suggest that if the court considers that proposed action would infringe Article 6, it might nevertheless take it, for that would be inconsistent with section 6 of the Human Rights Act 1998. What I think he meant was that “stifling” as such is only one part of the overall assessment of whether the action proposed will comply with Article 6.
26. I would therefore summarise the principles as follows.
27. **Jurisdiction.** The court can use its inherent jurisdiction and case management powers to secure compliance with its orders. Whether to make an order which sanctions a party unless he or she complies with a previous order for costs (whether final or by way of interim payment) is always a matter of discretion.
28. **Underlying policy rationale.** The underlying policy rationale of the costs regime, including for payments before the end of the case and interim payments, and the importance of ensuring that court orders are complied with, are always important features of the exercise of that discretion. These are weighty considerations which tell in favour of effective enforcement. They are legitimate aims which are capable of justifying restriction on unfettered access to the court.

29. **Options.** The court should consider all the available options including other enforcement mechanisms, and the full range of possible orders designed to secure compliance with its previous order.
30. Although the matter is always one of discretion, litigants can generally expect in many cases, if it appears possible for them to comply with the order (as, failing sufficient evidence to the contrary, the court will assume it is), a sanction is likely to follow. That is not a rule of law, but it rationally reflects where the balance will normally fall. But the court will not usually make an immediate order which prevents a claim or defence being advanced, but will usually (through an unless order or some other appropriate term) allow a short further period for compliance.
31. **Stifling and Article 6.** One (and the most commonly occurring) countervailing consideration will be if the party in breach can show that it does not have and cannot raise the money to comply with the order, so that there is a substantial risk that a claim or defence will be stifled. The court will then consider whether the proposed sanction is consistent with Article 6. The burden lies on the party asserting that a claim will be stifled to show that it is so. It must produce detailed, cogent and frank evidence sufficient to persuade the court on a balance of probabilities that it does not have and cannot raise the money required.
32. **All the circumstances remain relevant.** The court will consider all the circumstances of the case, including the conduct of the parties. It is not, however, to be assumed that the existence of an adverse costs order accompanied by an obligation of immediate payment is itself indicative of any misconduct.
33. I would add two points about things that I consider are not centrally relevant. First, I do not consider that the merits of the claim or defence are (at least usually) likely to be of much moment. As with applications for security for costs (see *Danilina v Chernukhin* [2018] EWCA Civ 1802, [2019] 1 WLR 758, at [69]–[70]) I doubt that such an application is a good occasion to scrutinise the merits of a claim in detail. If a claim were so manifestly bad that its failure in due course is a foregone conclusion or so manifestly good that its dismissal would be an irrefutable injustice, that might be said to be relevant. But there are specific procedures (notably, though not exclusively, under CPR Part 24) to obtain a pre-trial determination of wholly unmeritorious claims or defences. In approaching the Article 6 issues, the court will normally proceed on the basis that all that matters is that the claim has potential merit, since the whole purpose of Article 6 is to secure the right to have access to a court, including to its procedures for summary determination of clear cases, to adjudicate that very question.
34. Secondly, I think it is now clear that one point that struck Sir Richard Field forcefully in *Michael Wilson & Partners Ltd* is probably not often likely to be significant. Sir Richard suggested that the court should have regard to whether the same arguments were raised when the costs order was made, and if not whether they could or should have been made. What he seems to have had in mind is that absence of means to pay might be relied on as a reason why an order for immediate payment should not be made. That, as we now know, is unlikely. Lack of means is obviously not a relevant factor in deciding whether a costs order is made under CPR Part 44. More importantly, it is not a relevant factor in deciding whether an order for immediate payment should be made, since the Court of Appeal has held in relation to orders giving time to pay a debt that although the time limited for paying may be extended

where there *is* a prospect of being able to pay, a long extension where there is no prospect is not appropriate: see *Loson v Stack* [2018] EWCA Civ 803 at [23] (Patten LJ). It follows that it will rarely, if ever, be the case that “stifling” issues have been or could have been effectively considered when the original order was made.

Relevant procedural history

35. The claim form was issued in the Commercial Court on 17 February 2021, but no issue fee was paid. On 29 April 2022, Andrew Baker J ordered that the claim should be stayed until the issue fee was paid. He required it to be paid by 29 September 2022. On 5 July, the claimant applied for (and was granted by Jacobs J) further time to pay the issue fee, which was paid in November 2022.
36. Meanwhile, on 25 March 2022, Cockerill J had considered an application by the defendants for security for costs. She declined to order security. On that occasion, she said:

“I am not going to order security for costs today. I am troubled that we are at a position where all current indications that I can see are that this is a company which is operating on nothing, pretty much. If Mr Singh has got money, it does not look like a huge amount. He has got advice which, as to the merits, the bottom line from Mr Cakebread is a not unfavourable assessment. So this is a bona fide claim on the face of it. However, I do see your point that if this were a represented party, this is not the kind of evidence that I would be at all happy about.”
37. Cockerill J therefore directed the claimant to provide more detailed information about its financial position. I have not seen the material that was served, but quite detailed information (as I describe below) has been served for this hearing. The application for security for costs was not renewed.
38. The next event, following transfer to this court, was the hearing (over several different dates) of an application for summary judgment by the second defendant. In due course, that application was disposed of by being withdrawn, on the basis of amended particulars of claim. The claimant was, on that occasion, represented at some of the hearings by counsel. It is this set of events which led HHJ Pelling KC to impose a costs order on the claimant, with an order for an interim payment on account of £12,146.10. On that occasion, HHJ Pelling KC also ordered the claimant to pay the costs of the hearing before Andrew Baker J in April 2022, which he summarily assessed at £8,861.40. He also ordered a payment of £7,240.37, to cover the costs of the amendment application and part of the costs of preparing an amended defence. He gave liberty to the claimant, in respect of all those orders, to apply for additional time to pay.
39. The claimant did make that application, which came before David Quest KC on 22 March 2024. The judge declined to give the claimant additional time, not because he considered that the claimant was able to pay the costs, but because he considered that he was not likely to be able to pay them within the time sought. He said:

“The inability, through impecuniosity, to pay a costs order is not in itself a reason to extend the usual time periods, particularly in circumstances where there is no real prospect of a future payment within a reasonable period. That principle was recognised by the Court of Appeal in *Loson v Stack* [2018] EWCA Civ 803, which Mr Stuart, counsel for the Defendants, drew to my attention. It is not relevant in that respect that it is said that the Defendants, who will be the recipients of the costs payments, are themselves wealthy.

In the present case, the Claimant is seeking a very lengthy extension of time, up to 12 months. However, there is, in my view, no real reason to think that additional funding for the Claimant would be forthcoming even in that period. Mr Singh explained in his statement that the Claimant was already heavily indebted to its existing third party funding sources, and that he could not practically request further financial assistance from them. He said: ‘I believe that if the claimant is afforded an opportunity of a substantial extension of time to pay the three costs orders, then it is possible I could explore approaching friends of friends, family outside the UK and other business associates which I have not already contacted’, but those persons were not named or otherwise identified. No more detail was given, and the speculative possibility of raising funds in the future is not, in my judgment, a sufficient ground to justify the lengthy extension that is sought, or, indeed, any extension.”

40. He went on to make the point that his order would not stifle the claim because “[w]hat, if any, steps the court should take by way of enforcement of the costs orders, if they remain unpaid by the Claimant, will be a matter for another day and potentially another application. In the meantime, the proceedings will continue.”
41. The judge also ordered the claimant to pay the costs of that application, and of another matter related to the amended particulars (which had not been served in a form consistent with HHJ Pelling KC’s order, but with other changes besides) which he assessed at £7,000 (in respect of the application for further time to pay HHJ Pelling KC’s orders) and £11,000 (in respect of the the amendment matters).
42. Following that hearing, the claimant has prepared a revised version of the amended particulars of claim, which the second and third defendants accept are unobjectionable as such. As I set out above, however, they seek to impose conditions on service (that the outstanding costs orders be paid), and also apply to stay the action until that happens.

Application of the principles

43. There is no doubt that the claimant is in continuing breach of the costs orders here. They are orders for significant sums. No reason is advanced why they should not be enforced by an order and conditions such as those proposed, apart from the argument that the breach should not be regarded as wilfully disobedient, and that the orders

sought would stifle the claim and deprive the claimant of its right of access to justice. There are strong reasons why they should be enforced.

44. I have considered alternative methods for enforcement. Since the claimant company is (on its own evidence) without any material asset apart from this claim, whatever value that has, it does not seem to me that the “ordinary” methods of enforcement would be practically effective.
45. In those circumstances, but for the stifling argument, I would see no reason not to make orders as the second and third defendants seek, and strong reasons to make them. The orders would afford the claimant a rather open-ended opportunity to remedy its breach, because they would amount to a stay which could be lifted, not a final determination of the claim. The only real disadvantages to such orders would be (1) that a stay would leave an already stale claim “in the air” and (2) that because the orders are sought only in respect of the second and third defendants, and not the first, there would be some difficulty in working out how to proceed, and a risk that claims against different defendants would get “out of kilter”. I would not, however, regard these as reasons outweighing the grant of the relief sought, because (1) the claim against the first defendant is at a very early stage and (2) if the claimant has or could raise the money to pay the orders, it could lift the stay simply by paying the costs as ordered.
46. The critical issue therefore is stifling, and whether the claimant can or could pay the orders. Mr Stuart submitted that the court should be all the more willing to make the orders, even if there appears to be some risk of stifling, because they seek only a stay, not dismissal. I do not think that point in itself makes a real difference to the analysis. If the claimant probably cannot do what is necessary to lift the stay, it will remain in place indefinitely. Its imposition will jeopardise the fair trial of an already rather stale claim. And Article 6 guarantees a fair trial “within a reasonable time”. It seems to me that the *Goldtrail* question is the right question to ask.
47. There is in my view (and Mr Stuart accepted this) cogent, detailed, and frank evidence that the claimant is not itself in a position to pay the sums that have been ordered. The claimant has provided financial statements showing that.
48. There is also, in my view, cogent, detailed, and frank evidence which shows that Mr Singh, the claimant’s sole shareholder, cannot put the claimant in funds to meet the costs that have been ordered to be paid. Mr Stuart trailed a coat that Mr Singh might have other assets or sources of income, such as offshore bank accounts. But there is no evidence that that is the case. The evidence before the court is that Mr Singh has a modest income from universal credit and some mobility allowance, and is unable to work for medical reasons that he explained in detail. He has produced documentary evidence of that, and bank statements which Mr Stuart accepted show that he lives within his limited means. It is abundantly clear that it would be inconceivable that he, as the claimant’s shareholder, could provide the claimant with the money to meet the costs orders. I was not left with any residual concern that Mr Singh’s evidence in this respect was lacking in frankness or candour; it was detailed and supported by documents and dealt frankly with other companies in which he had or might have an interest (neither of which is a credible source of funds).

49. Two alternative sources of funding were canvassed by Mr Stuart. The first is commercial litigation funding. I accept, in principle, that if litigation funding were available that might be a relevant source. But I do not accept Mr Stuart's submission that the claimant faces a "catch-22": if the case were a viable one, litigation funding would readily be available (so the order should be made); if litigation funding is not available, it should be assumed that the case is hopeless (so the order should be made). In the first place, it seems to me, that invites a review of the merits that I have (rightly) not been asked to carry out. In the second place, litigation funders are commercial investors whose decisions will be affected by a wide range of factors. There may be all manner of reasons why a viable and valuable claim may prove unattractive to commercial litigation funders.
50. I do, however, accept that it is incumbent upon the claimant to explain why commercial litigation funding is not an available source of money. It has adduced evidence which shows that a significant effort was made to find litigation funding in 2020, without success. The claimant waived privilege in advice signed by Stuart Cakebread and Juliette Levy of Cerulean, barristers and solicitors, in 2020 which gave the opinion that the claimant's claims had favourable prospects of success. Mr Singh also produced documentary evidence showing that various funders were approached in 2021, through a broker, but that they declined to fund. Not all gave any reason. Those who did expressed concern about the difficulty of enforcement. There appears therefore to have been a serious attempt to find litigation funding, which was not successful. Mr Stuart invited me to find that this was insufficient because later attempts might have borne fruit. I reject that submission. Nothing has happened since 2021 to make the claim any more attractive to funders; indeed, it has barely progressed. The evidence establishes a concerted attempt to find funding for the claim; there has been no important improvement in the underlying merits of the claim or its inherent attractiveness to funders. That is in my view amply sufficient to conclude, on a balance of probabilities, that funding is not likely to be available.
51. The second possible source of funding was friends or family. I have already expressed my hesitation about assuming, as a general matter, that any litigant is likely to have access to well-wishers who are willing to support it to the tune of upwards of £60,000. That is likely to be even less attractive as a proposition if the friends realise that as the case proceeds, and if further costs orders are made (which no fair-minded or dispassionate observer of litigation would discount as a possibility), then still more money will be required, failing which the claim may be lost, and any prospect of repayment with it.
52. In this case, however, Mr Stuart can point to the undoubted and admitted fact that on previous occasions, friends and family have indeed been willing to provide support, and I agree that this calls for scrutiny. Although expressing some reticence (which I understand and do not criticise—it is a reticence commonly shared by professional litigation funders), Mr Singh has provided bank statements showing payments they made and during the hearing he named them and explained their relationship to him.
53. On 2 October 2023, £3000 was received from one person (whose name is identified and whom I shall call CR) which was then transferred to Thomas More Chambers, presumably to pay counsel. Mr Singh told me that CR is a close friend.

54. On 30 October 2023, £11,255 was received from another person (whose name is identified and whom I shall call NR) and again paid to Thomas More Chambers, presumably to pay counsel. Mr Singh told me that NR is a family member.
55. On 2 November 2023, a further £4,450 was received from NR, and mostly used to pay a costs liability to the second and third defendants, the balance being used to pay a court fee.
56. Each of those payments is described in the bank statement narrative as a “loan”. Mr Singh’s evidence also records that the £10,000 issue fee was paid in late 2022 from a loan made by family and friends, though the bank statements do not show these payments.
57. Mr Singh’s evidence described these as “crowd funded”. I agree with Mr Stuart’s submission that if these are specific loans from family and friends that is not a very apt expression, for no “crowd” is involved. But I do not think it was an expression intended to mislead. Mr Singh simply meant that it was support to the claimant that was provided out of benevolent motives. If Mr Stuart meant to submit that it would normally be necessary for a party to attempt “crowd-funding”, or exclude it as a possible source of litigation funding, I do not agree. Although crowd funding might sometimes be used in high profile or public interest cases, it is most unlikely to be a viable mechanism to support commercial litigation such as this.
58. Mr Stuart submits that these payments show that when the claimant needs money, it can find it. He points out that in March, when asking for more time, Mr Singh submitted to Mr David Quest KC that he hoped that these or similar sources could yield the money within 12 months. The transcript records:

“I am hoping that within-- at that point or near that point I can reach out to other relatives, friends of friends and other family members which I have not currently contacted now, to help pay £10,000 within six months, and the remaining balance within 12 months, if your Honour provides the opportunity to do so.”

Mr Stuart submits that given that statement, Mr Singh has not established that he could not meet the payments, either from his existing lenders or from other family and friends.

59. Mr Singh says that is not the case. Friends and family were willing to lend significant but relatively modest sums of money at earlier points (the total is around £28,000), but are no longer willing to advance more, much less the £60,000 or so that would be required now. His evidence is:

“I do not currently receive or have available additional financial support from my friends and family (i.e. the Third Parties), as I have exhausted such personal relationships pursuant to the Claimant already being heavily indebted to them. I have also since confirmed with my other relatives in India who were unwilling to provide credit to the Claimant.”

60. I see no reason to reject that evidence. I do not think that the history here shows that the claimant has always been able to find money whenever it is required: its long delay in paying the issue fee suggests the contrary. The evidence shows that it has sometimes been able to find relatively small sums from Mr Singh's family and friends. It is not incredible that those people should lack either the resources or the appetite to provide a further £60,000 with no immediate prospect of repayment and every prospect of being required to find more money in the future. Nor do I consider this inconsistent with Mr Singh's "hope", as he expressed it in March, that he might find £10,000 within six months and the balance in 12 months—a hope which Mr Quest KC thought little more than speculation and which Mr Singh now says, having spoken to relatives in India, is forlorn. Moreover, I do not accept that the evidence is insufficient in either cogency or detail. I would not expect a person in Mr Singh's position to be able to raise additional money of this sort, Mr Singh has identified the two key donors and explained why they will not provide what the claimant needs, and there is no reason to doubt what he says about his other family members. Although Mr Stuart criticised the claimant for not producing statements from CR and NR (and Mr Singh offered to provide them), I do not regard that as a significant deficiency, and doubt that such statements would carry much weight or add anything to what I regard as the inherent probability of Mr Singh's explanation.
61. The claimant has, therefore, in this respect, satisfied me on a balance of probabilities that these friends in time of need would not provide it with the money to pay the outstanding orders.
62. This is consistent with David Quest KC's decision. As set out above, that judge was satisfied on the evidence before him (as was the second and third defendants' case) that raising funds to pay the costs orders within any reasonable period was merely a "speculative possibility" and that there was no "real prospect" of the orders being paid in the 12 months being sought. Mr Stuart reminded me that the precise question here is different: the burden was then on the claimant to establish a "real prospect", and is now on the claimant to show on a balance of probabilities that the funds will not be raised. I accept that point, in principle. It might be a powerful point if Mr Quest's decision had rested on the view that the claimant had not adduced evidence to show that it could not pay the costs immediately. But I think Mr Singh may be forgiven for regarding it as somewhat elusive distinction in practical application here. Unless the probabilities are precisely evenly balanced, or impossible to assess on the evidence, the incidence of the burden of proof is not decisive. Mr Quest KC was not left uncertain about the claimant's prospects of raising the money within a reasonable time: he was satisfied on the evidence that there was no realistic prospect of that, and no more than a "speculative possibility" of money being raised. On the evidence before me, I would independently reach the same view. Mr Singh's acceptance of it does not seem to me to be something that should be criticised. It is realistic. The boot being now on the other foot, if the most that the court can conclude is that there is a merely "speculative possibility" that money might be raised, it can and should conclude that on a balance of probability it will not be. On the evidence before me, I do so conclude.
63. It does not necessarily follow that I should refuse the stay application. But, stepping back and considering all the circumstances of the case, I consider that is the appropriate course here. I do not consider that the evidence suggests that the claimant,

or Mr Singh, is behaving in deliberate breach of the court's orders. I accept that the evidence is sometimes framed in hyperbolic ways; though a degree of hyperbole appears also in the second and third defendants' evidence too. There has been some serious muddle around the preparation and service of amended particulars of claim, but I see no reason to disbelieve Mr Singh's explanation that this is the result of confusion on his part, and not any attempt to be difficult for the sake of it. I should also make it clear, however, that I reject Mr Singh's suggestions that the second and third defendants have behaved improperly. In particular, the fact that their costs have been reduced on summary assessment does not suggest—much less show—any impropriety in the statements presented. Costs usually are reduced on assessment.

64. Having considered all the factors set out above, I (a) decline to impose as a condition on the service of the amended particulars of claim any requirement that the outstanding costs orders should be paid and (b) decline to stay the action until they are paid. I should make it quite clear that this does not mean that the claimant is relieved of its obligation to pay those orders. It simply means that, in the exercise of my discretion, and in all the circumstances of this particular case, I decline to take the course proposed by the second and third defendants.
65. That leaves only the remaining submission that it should be a condition of the amendment that the claimant pay the costs occasioned by it, and the application for it, on an indemnity basis.
66. I shall not, as a matter of discretion, make such an order. As to the past, the claimant's conduct has already been quite sufficiently addressed by the costs orders made by HHJ Pelling KC and Mr Quest KC. This application, in terms of the actual form of the amended pleading, was (as the second and third defendants accept) unobjectionable, and one that could simply have been consented to. It has only been contested because of the overlap with the stay application, which has failed. As to the future, and the costs of amending the defence, I see no reason why costs should be on an indemnity basis. That is not the usual order, and would serve no useful or proportionate purpose. The order should simply be the usual order that the second and third defendants should have the costs of and occasioned by the amendments.
67. The result is that I shall allow the amendments, on the usual terms, and dismiss the second and third defendants' application for a stay. I shall hear the parties on the form of my order.