

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2023/0025

BETWEEN:

[1] SANCUS FINANCIAL HOLDINGS LIMITED

[2] CARSON WEN

[3] JULIA YUET SHAN FUNG

Appellants

and

CHAD CHRISTOPHER HOLM

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis

The Hon. Mde. V. Georgis Taylor Alexander

The Hon. Mr. Darshan Ramdhani

Justice of Appeal

Justice of Appeal [Ag.]

Justice of Appeal [Ag.]

Appearances:

No appearance for the first Appellant

The second and third Appellants in person

Mr. Robert Levy KC with him Mr. Oliver Clifton and Ms. Colleen Farrington
for the Respondent

2024: November 1;

2025: October 2.

Interlocutory Appeal – First appellant withdrawing and discontinuing its appeal – Damages – Interim damages – Rule 17 Civil Procedure Rules – Assessment of interim damages to be paid to respondent – Courts discretion to order reasonable proportion of the likely amount of final judgment as interim payment on account of damages – Proper approach to assessing likely amount of final Judgment – Whether the judge erred in law in “working backwards” when analyzing whether the interim payment sought was a reasonable proportion of the overall amount of damages which the respondent is likely to obtain at trial – Whether the judge erred by failing to take into account as relevant to the exercise of determining whether an interim payment of damages should be made and could be assessed, the respondent’s refusal to plead or state his case on loss – Whether the judge erred by disregarding the need for the respondent to show (as at the date of hearing) that he had already suffered loss as a matter of causation – Whether the judge erred by failing to consider the evidence by the

appellants that they could not afford to pay damages in the amount sought – Whether the judge erred by failing to consider the prejudice to the appellants in making the interim damages order – Whether the judge erred by considering irrelevant factors and by failing to consider relevant ones – Whether the judge’s award of interim damages to the respondent was blatantly wrong

This appeal stems from an *ex tempore* judgment delivered on 23rd September 2023 following an application for an interim payment under Rule 17.5 of the Eastern Caribbean Civil Procedure Rules (Revised Edition) 2023 (“CPR”). The underlying claim was brought by the respondent together with FH Investment (BVI) Limited against Sancus Financial Holdings Limited, Carson Wen and Julia Yuet Shan Fung (together “the appellants”) seeking damages for breach of contract in relation to an investment initiative known as the Bank of Asia Project (“the Project”). The Project was a comprehensive financial services and financial technology (fintech) venture that involved: (i) Bank of Asia (BVI) Limited which was licensed by the BVI Financial Services Commission and (ii) a network of associated operations throughout Asia and other jurisdictions.

The claim was bifurcated with liability and quantum to be determined separately. By a judgment on liability dated 19th December 2018 the respondent was found to be entitled to damages for breach of contract (the “liability judgment”). In that judgment the court recognised the respondent’s entitlement to 22% of the appellants’ interest in the Project at the time of the breach subject to dilution from any third-party investments. Subsequent appeals by the appellants against the liability judgment, first to this Court and then to the Judicial Committee of the Privy Council were dismissed. On 13th April 2023, the respondent filed an application seeking an order that the appellants make an interim payment of damages pursuant to the Rule 17.5 of the CPR in the sum of US\$16.5 million dollars (“the application”) comprising of US\$12.5 million for damages and US\$4 million dollars in interest. On 20th September 2023 the application was granted.

Dissatisfied with the order of the learned judge, the appellants appealed on 14th February 2024 challenging the judgment of the learned judge, seeking that the interim damages order be set aside and for an order for the respondent to pay the appellants’ costs of the appeal. The notice of appeal contained 8 grounds of appeal that can be reduced to the following 4 issues for determination: (i) Whether the learned judge erred in the approach to determine whether the interim payment sought represented a reasonable proportion of the overall damages likely to be awarded to the respondent at the quantum trial; (ii) Whether there was sufficient evidence before the court, at the time of the application, to enable a proper assessment of the likely overall damages and, by extension, to determine a reasonable proportion for the purposes of an interim award; (iii) Whether, as a matter of causation, it was necessary for the respondent to demonstrate that he had already sustained loss at the time of the interim payment application and; (iv) Whether the judge was required to consider the appellants’ alleged impecuniosity when deciding whether to make an order for interim damages.

Held: dismissing the appeal, lifting the stay of execution previously granted and awarding costs of the appeal to respondent to be assessed if not agreed, that:

1. Part 17 of the CPR confers upon the court a broad discretionary jurisdiction to grant interim remedies at any stage of the proceedings. One such remedy, an interim payment order, ensures that claimants who are likely to succeed at trial are not unduly disadvantaged by the protracted nature of litigation by allowing for the payment of damages before a final award is made. Where an applicant brings himself within the category of claim identified under rule 17.6(1), the discretion to order an interim payment must be exercised on a cautious and conservative basis in an effort to avoid any risk of overpayment, while at the same time ensuring that the claimant is not unjustly kept out of a reasonable portion of what is plainly his due. The jurisdiction is intended to be exercised broadly and practically, and not by way of mini trial. The relevant authorities commend a structured three-stage methodology: first, estimating the likely final judgment; second, determining a reasonable proportion of that amount and third, considering relevant discretionary factors. It is equally clear however that this framework is not to be applied with rigidity. Its utility will depend on the circumstances of the particular case and where quantification is especially complex, a mechanistic application may be inappropriate. Crucially, difficulty in estimating the likely final judgment is not in itself a bar to an interim award. Where the court can safely conclude that the claimant will recover at least a certain sum, and is likely to recover more, that “irreducible minimum” may properly form the basis for an interim payment.

Spillman v Bradfield Riding Centre [2007] EWHC 89 (QB) applied; **Re Stratos Club** [2021] EWHC 1008 (Ch) applied; **Eeles v Cobham Hire Services Ltd** [2010] 1 WLR 409 applied; **Newport (Essex) Engineering Ltd v Press & Shear** [1981] 24 BLR 71 applied.

2. While the learned judge did not undertake the kind of conservatively reasoned estimate of the likely final award contemplated in authorities such as **Eeles** and **Spillman**, he was alive to the challenges of doing so in the present case, given the nascent stage of the Project. He nevertheless approached the matter in a manner consistent with the reasoning in **Newport**. That decision makes clear that the difficulty of quantifying the likely final award ought not, in and of itself, to preclude the making of an interim payment, so long as the court can be satisfied that there is no real risk of overpayment. The learned judge was plainly so satisfied. He observed that liability had already been determined in favour of the respondent and relying on the valuations submitted by the parties particularly the evidence of the appellants’ own expert, he identified a base figure of US\$12.5 million as a secure foundation. Against that background, he was entitled to conclude that the interim award of US\$16.5 million being the base figure with interest thereon represented a conservatively assessed minimum recovery and would not exceed the amount ultimately awarded at trial.
3. The threshold for appellate interference with the exercise of a judicial discretion is, as this Court has repeatedly emphasised, a high one. It is not enough that an appellate court might have exercised the discretion differently, the court must be satisfied that the decision under appeal was “plainly wrong”. Interference is permissible only in limited circumstances. Those circumstances arise where it is

shown that the judge, in exercising the discretion, erred in principle, either by failing to take account of relevant considerations, by attaching disproportionate weight to them, or by having regard to matters which were irrelevant and that, in consequence, the decision falls outside the generous ambit within which reasonable disagreement is possible, so as to be said to be plainly wrong. In the circumstances of this case, it cannot be said that the learned judge was plainly wrong. Consequently, there is no basis for appellate interference, and grounds 1 and 2 of appeal fail.

JTrust Asia PTE Ltd v Mitsuji Konoshita et al BVIHCMAP2020/0022 (delivered 31st May 2021, unreported) followed.

4. The normal measure of damages for breach of contract at common law in the Virgin Islands, as in England, is compensatory: the object being to place the innocent party, so far as money can do, in the position he would have occupied had the contract been performed. Both parties accept that the general rule is that damages are assessed as at the date of the breach. But that rule is not inflexible, and the courts have long recognised circumstances in which departure from it is justified. If rigid application would produce injustice, for example, where there is no ready market at the date of breach, or where the innocent party has reasonably continued to pursue performance, the court may adopt another date. The court retains a discretion to identify a date more consistent with the compensatory principle where no immediately available market substitute exists or where rigid application of the breach-date rule would unfairly depress compensation.

Johnson v Agnew [1979] 1 All ER 883 applied; **Hooper v Oates** [2007] 2 AC 353 applied; **Marathon Asset Management LLP v Seddon** [2017] EWHC 300 (Comm) applied; **Techno Land Improvements Ltd v British Leyland (UK) Ltd** [1979] 2 EGLR 27 applied.

5. In the present case, it was common ground that no market existed for the Bank of Asia shares at the date of breach. The project was still at an early stage, and the value of the respondent's interest lay in its developmental prospects. To insist upon a breach-date valuation would have artificially depressed the respondent's compensable loss. The learned judge was therefore entitled to reject that approach. On the expert evidence, he found that a conservative minimum value of US\$12.5 million could safely be attributed to the respondent's 22% holding, a figure consistent with the appellants' own expert's assessment. He also noted the prolonged passage of time, nearly seven years since the breach, during which the respondent had received neither damages nor reimbursement of litigation costs, which were estimated at US\$6 million. In those circumstances, the grant of an interim award was both fair and justified, and the sum arrived at represented a safe irreducible minimum supported by the evidence. Additionally, the appellant's argument that the absence of a realised gain precludes loss cannot be accepted. The deprivation of the contractual entitlement to shares is itself a compensable loss. Therefore, the learned judge neither erred in principle nor in fact. The award of US\$16.5 million was firmly grounded in the evidence, consistent with the appellants'

own expert valuation, and fully in keeping with the requirements of CPR 17.6. It reflected both a proper application of legal principle and a careful assessment of the factual circumstances, including the protracted delay in compensating the respondent. The appeal on grounds 3 and 4 is accordingly dismissed, and the learned judge's order is affirmed.

6. On a proper construction of CPR rule 17.6, a claimant is not required to establish financial necessity, nor is the court bound to consider potential prejudice to a defendant, as a precondition to granting an order for interim payment. The rule is cast in broad terms, the only express limitation being contained in rule 17.6(2). That provision is confined to claims for personal injury, where the court may only order an interim payment if the defendant has the means and resources to do so, is insured in respect of the claim, or is a public authority. No similar reservation exists in respect of other causes of action, and it is plain that the rules do not contemplate any general obligation on the court to investigate the means of a defendant outside the personal injury context. The appellants' reliance on hardship as a threshold condition is therefore misplaced. It follows that the appellants' argument that the judge failed to balance the prejudice to both sides is unsustainable. The appeals under grounds 5,6,7 are equally dismissed.

Schott Kem Ltd v Bentley 1 WLR 1008 (CA) **applied**.

JUDGMENT

- [1] **TAYLOR ALEXANDER JA [Ag.]:** This appeal arises from an *ex tempore* judgment delivered by the High Court of the BVI Commercial Division on 23rd September 2023, following an application by the respondent/claimant for an interim payment pursuant to Rule 17.5 of the Eastern Caribbean Civil Procedure Rules (Revised Edition) 2023 ("CPR") which governs interim remedies. By its judgment, the court ordered the appellants to pay interim damages to the respondent in the total sum of US \$16.5 million, comprising US \$12.5 million in damages and US \$4 million in interest.

Background

- [2] The underlying claim was commenced in January 2017 by the respondent and FH Investment (BVI) Limited against Sancus Financial Holdings Limited, Carson Wen, and Julia Yuet Shan Fung ("the appellants"), seeking damages for breach of contract in connection with an investment initiative referred to as the Bank of Asia Project ("the Project"). The Project was a comprehensive financial services and financial technology (fintech) venture that encompassed: (i) Bank of Asia (BVI) Limited, which was licensed

by the BVI Financial Services Commission, and (ii) a network of associated operations throughout Asia and other jurisdictions.

- [3] The claim was bifurcated, with liability and quantum to be determined separately. By a judgment on liability dated 19th December 2018, the respondent was found entitled to damages for breach of contract (the “liability judgment”). In that judgment, the court recognized the respondent’s entitlement to 22% of what was, at the time of the breach, the appellants’ interest in the Project, subject to dilution from any third-party investments.
- [4] Subsequent appeals by the appellants against the liability judgment, first to the Court of Appeal of the Eastern Caribbean Supreme Court, and then to the Judicial Committee of the Privy Council, were dismissed.
- [5] On 13th April 2023, the respondent filed an application seeking an order that the appellants make an interim payment of damages pursuant to **Civil Procedure Rules (Revised Edition) 2023 (‘CPR’)** rule 17.5 in the sum of US \$16.5 million dollars (“the application”). The payment of US \$16.5 million dollars was said to comprise of the sum of US \$12.5 million for what the respondent described as the “irreducible minimum” of damages which the respondent claimed to be entitled, together with US \$4 million dollars in interest. On 20th September 2023 the learned judge below granted the application, ordering, *inter alia*, that the appellants make an interim payment on account of damages to the respondent in the amount of US\$16.5 million dollars within 21 days of the order.
- [6] Also relevant to the proceedings is that, by order dated 12th September 2023, the respondent obtained a worldwide freezing injunction against the appellants (“the Worldwide Freezing Order”). Additionally, by a Notice of Discontinuance dated 31st October 2024, the first appellant formally discontinued its appeal against the respondent. For the purposes of this judgment, the second and third appellants are referred to as the appellants.

The Appeal

[7] Upon obtaining leave to appeal, the appellants filed their notice of appeal on 14th February 2024¹ challenging the *ex tempore* judgment of the learned judge, seeking that the interim damages order be set aside, and an order for the respondent to pay the appellants' costs of the appeal, including costs related to the respondent's application to strike out the appeal. The notice of appeal contains eight (8) grounds of appeal which are as follows:

- (i) The judge erred by 'working backwards' when analyzing whether the interim payment sought was a reasonable proportion of the overall amount of damages which the respondent is likely to obtain at the quantum trial.
- (ii) The judge erred in law and in fact in failing to consider as relevant to the exercise of determining whether an interim payment of damages should be made and could be assessed based on the evidence before the court.
- (iii) The judge erred in law in disregarding the need for the respondent as at the date of hearing or with sufficient evidence that he had already suffered loss as a matter of causation as an essential part of establishing the likelihood of obtaining any damages and the overall amount of any damages likely to be obtained at trial.
- (iv) The judge erred in failing to have regard to what the evidence before him showed to be more likely than not on the balance of probabilities, namely since the date of breach as there had not in fact been any realistic market in any interest in the Project sufficient to enable the respondent to sell his interest or any substantial proportion of it for the value claimed or for the amount sought by way of interim damages.
- (v) The judge failed to take account of the appellants' evidence that they could not afford to pay damages in the amount sought and would not be in any position to pay damages of the level sought.

¹ Pages 6-13 of the Record of Appeal (Part 1) filed on 8th November 2023.

- (vi) The judge failed to properly consider and balance the prejudice to the appellants in making an interim damages order against the alleged prejudice to the respondent in awaiting trial for damages to be quantified and paid.
- (vii) Given the evidence presented at the time of the application, the judge could not be satisfied that the amount sought, and subsequently ordered as interim damages, was a reasonable proportion of the likely final judgment.
- (viii) There is a lack of judicial analysis of this area of law in the Virgin Islands and Eastern Caribbean Supreme Court jurisdictions generally, and there is therefore public interest in the issue being considered at appeal level.

The issues for determination

- [8] The issues for determination can more conveniently be reduced to 4 concrete grounds:
- (i) Whether the learned judge erred in the approach to determine whether the interim payment sought represented a reasonable proportion of the overall damages likely to be awarded to the respondent at the quantum trial.
 - (ii) Whether there was sufficient evidence before the court, at the time of the application, to enable a proper assessment of the likely overall damages and, by extension, to determine a reasonable proportion for the purposes of an interim award.
 - (iii) Whether, as a matter of causation, it was necessary for the respondent to demonstrate that he had already sustained loss at the time of the interim payment application.
 - (iv) Whether the judge was required to consider the appellants' alleged impecuniosity when deciding whether to make an order for interim damages.

Grounds 1 and 2 (Issues 1 and 2) Appellants' submissions

- [9] The appellants contend that the learned judge misdirected himself either in principle or in the evaluative exercise required under Rule 17.6(4) of the CPR to assess whether the interim payment of US\$16.5 million sought by the respondent represented a reasonable proportion of the damages likely to be awarded at the quantum trial.
- [10] The appellants submit that the judge erroneously determined the interim damages award by using an incorrect approach when he "worked backwards" from the sum of US \$16.5 million proposed by the respondent, to determine whether it was a reasonable proportion of the overall damages. They further assert that the learned judge ought to have followed the proper three-stage process outlined in the case of **Spillman v Bradfield Riding Centre ("Spillman")**² which is as follows:
- (i) first the Court must determine the likely amount of the final judgment the applicant/claimant is likely to receive at trial;
 - (ii) second, the Court must assess the reasonable portion of that amount and;
 - (iii) third, the Court must consider any relevant matters in the overall exercise of its discretion to award an interim payment.

- [11] The appellants cite and rely on **Zuckerman on Civil Procedure ("Zuckerman")**³ which they submit summarises the approach taken by the English courts:

"The court must start by assessing the amount likely to be awarded if the claimant were to succeed at the trial. This amount has to be reduced to a reasonable proportion. The reasonableness of the amount of the interim payment will depend on a variety of factors, including the claimant's chances of establishing their entitlement to the amount claimed, the likelihood that the defendant will be unable to recover from the claimant any overpayment and the hardship that the defendant is likely to suffer from having to make immediate payment or from being unable to recover overpayment...Accordingly, the claimant's impecuniosity tends to both strengthen the case for an interim payment, due to the claimant's need, and weaken it, due to the increased risk that the defendant will be unable to recover overpayment. Much must therefore depend on the court's confidence that the claimant will be able to recover the amount claimed."

² [2007] EWHC 89 (QB) 13.

³ Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013).

- [12] The appellants contend that the learned judge erred by prematurely concluding that the respondent was likely to recover a substantial award of damages, without undertaking a thorough assessment of the probable quantum of the final judgment. In support of this submission, they rely on **Eeles v Cobham Hire Services Ltd.**⁴, which underscores that the judge's primary task is to arrive at an informed estimate of the likely final award before considering the propriety of an interim payment.
- [13] The appellants accept that the learned judge was not required to specify a precise figure for an award of damages, but they argued that the judge's approach of settling on a figure of US \$80 million as a likely final judgment after already accepting the interim damages of US \$16.5 million was flawed.

Respondent's submissions

- [14] The respondent contends that the appellants' challenge is, in substance, an attack on the learned judge's exercise of discretion in making the Interim Damages Order. He argues that none of the eight grounds set out in paragraphs 7 to 14 of the Notice of Appeal discloses a sustainable basis for resisting the application for interim payment, and that the appellants are, in effect, seeking to re-litigate matters that were fully ventilated and determined at first instance.
- [15] He further submits that the appeal does not rest on any single, discrete error of fact. Rather, it challenges the judge's evaluative and composite findings. The respondent submits that the burden on the appellants is to demonstrate that the decision of the lower court was erroneous. The respondent submits that the appellants are, in substance, inviting this Court to revisit and substantially recast the trial judge's reasoning, an exercise falling outside the proper scope of appellate review.
- [16] The respondent submits that the learned judge's approach was correct and is in line with English case law and authorities and that the exercise of the jurisdiction to grant

⁴ [2009] EWCA Civ 1020.

interim damages involves a less than scientific approach. They contend that the requirements of CPR 17.6 were satisfied and the threshold for making such an order was met.

[17] The respondent reinforces its position on the soundness of the learned judge's approach by relying on **Re Stratos Club**⁵ in which Thompson LJ explained that under rule 25.7(4) of the Civil Procedure Rules 1998 (UKCPR), a provision materially similar in wording and intent to CPR 17.6, the court is not required to attain certainty as to the final judgment sum. Rather, the court must estimate the likely amount and determine a reasonable proportion for interim payment. Thompson LJ emphasised that the process should not devolve into a mini-trial, and that the court's inquiry is confined to determining whether it is unlikely that the interim payment will exceed the sum ultimately awarded. He submits that **Zuckerman**, relied on by the appellants explicitly relates to cases where the defendant's liability is still to be determined whereas liability had been conclusively determined against the appellants.

[18] The respondent relies on **Mc Gregor on Damages**⁶ where the authors acknowledged that the availability of interim payments can help with the problem of the uncertainty of the future because the need to proceed with great speed to the end of the litigation is reduced. The authors note that:

“ This is particularly true where advantage is taken, where appropriate, of splitting the claim into two parts, so that the issue of liability is decided first and the assessment of damages is arrived at later, with provision for the awarding at the hearing on liability of interim payment on account of the final award...” and further that “No more than a reasonable proportion of the likely amount of the final judgment should be ordered. Nevertheless, a reasonable proportion may well be a high proportion, even 90 percent of the loss incurred, although possibly limited to the loss at the time of payment, especially if the estimate is conservative so that there is no risk of overpayment. Ultimately, this suggestion of a possible limit should not be accepted. The better approach is to recognize that there is no such fixed limit. Provided that a conservative approach is taken, there is no reason that a court should not take into account special damages that are extremely likely to accrue between the date of the interim payment order and the date of the quantum trial. Nevertheless, the greater the degree of

⁵ [2021] EWHC 1008 (Ch).

⁶ McGregor, *McGregor on Damages* (21st edn, Sweet & Maxwell 2020) ch 40, sec 1.

uncertainty, the less weight that the court should give to any such estimate, potentially with no weight at all to such amount if there is any substantial uncertainty.”

[19] The respondent also relies on the approach taken by the English Court of Appeal in **Newport (Essex) Engineering Ltd v Press & Shear**⁷ (“**Newport**”), where the court considered an application made under Order 29 Rule 10 of the Rules of the Supreme Court of England, for an order under Rule 11, which, as far as relevant, stated:

- a. “11 (1) If, on the hearing of an application under rule 10 in an action for damages, the court is satisfied
 - (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed;
the court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff.”

[20] The respondent submits that in **Newport** the court accepted that the approach to an interim award requires the court to make an estimate of the damages which are “likely to be recovered” when the issue is finally determined. The court noted that ease or difficulty in making such an estimate will vary enormously from case to case, with some cases being quite impossible to make a useful estimate without hearing the case out. The court reasoned that difficulty in making an estimate should not bar a claimant from receiving an interim payment. If the court can reasonably say that the claimant will recover at least a certain amount and is likely to recover more, then that certain amount may be considered a reasonable interim payment. But if the claimant is unlikely to recover more than that certain amount, then any interim award should be significantly less than that amount. Connor LJ said this:

“...on the material available to the court hearing the application, the court may be in a position to say, “the plaintiff should recover at least £x and is likely to recover more or a great deal more”. In such a case, I do not think it would be wrong to say that £x itself is a reasonable proportion. In contrast, if the court can say “the plaintiffs should recover at least £x, but is unlikely to recover more” , then £x itself becomes the likely award and a reasonable proportion should be something substantially less than £x”

⁷ [1981] 24 BLR 71.

[21] The respondent asserts that the learned judge's approach was consistent with that of **Newport** and that the learned judge's decision to approve an interim payment of US\$16.5 million, was based on a cautious and conservative approach. The appellants' expert report provided the basis for determining the "irreducible minimum" value of the respondent's interest. The report's "floor" valuation of US\$16.5 million, derived from market-based methods and prior transactions, was accepted by the learned judge. Despite the appellants' claim that the evidence for an \$80 million figure was insufficient, the evidence in the expert report and market transactions supported the idea that the final judgment could exceed US\$16.5 million, thus justifying the interim payment. The respondent noted that this approach was consistent with the approach adopted in the English High court case of **Trebor Bassett Holdings v ADT Fire and Security**⁸ (**Trebor**) which the respondent says endorses an approach determining a safe amount in respect of which there is no risk of overpayment, that figure being the 'irreducible minimum', In **Trebor** Coulson J said:

"[9] In my view, the right approach to an interim payment application is that expressed by Robert Walker J (as he then was) in *Chiron Corporation v Murex Diagnostics Ltd* [1996] FSR 578 where he said:

'But I do not read Neil LJ's general observation [in *Scott Thame v Bentley* [1991] 1 QB 61] as excluding an application for an interim payment in relation to part (I might say, an irreducible minimum part) of a claim which may be capable of being established without venturing far into disputed areas of fact or law – provided that the irreducible minimum part is substantial enough to justify the trouble and expense of an interlocutory application. Here the Plaintiffs say the irreducible minimum is £7 million out of a total claim, on their calculations, well in excess of £100 million....'

Coulson LJ also relied on guidance provided by the Court of Appeal as to the operation of the test under UK CPR r 25.7(1)(c) in **Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners**.⁹ In that case Aikens LJ dealt in detail with the test at para 38 of his judgment:

"The second point is what precisely is meant by the court being satisfied that, if the claim went to trial, the Claimant 'would obtain judgment for a substantial amount of money'? In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before

⁸ [2012] EWHC 3365.

⁹ [2012] EWCA Civ 57.

the judge at the time of the application for an interim payment, the Claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an interim payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the Claimant has, in fact, succeeded... The court must be satisfied (to the standard of a balance of probabilities) that the Claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was 'likely' that the Claimant would obtain judgment or that it was 'likely' that he would obtain a substantial amount of money."

Discussion

[22] Part 17 of the CPR confers upon the court a broad discretionary jurisdiction to grant interim remedies at any stage of the proceedings. This jurisdiction extends to the period following judgment but prior to the final assessment of quantum. Among these remedies, the interim payment order ensures that claimants who are likely to succeed at trial are not unduly disadvantaged by the protracted nature of litigation, and as such allows for the payment of damages before a final award is made. The underlying rationale for interim payment orders is clear; where a claimant has established a clear entitlement to a monetary award, the court may properly intervene to prevent injustice occasioned by delay in the quantification of damages. This ensures that a successful party is not kept out of funds to which they are demonstrably entitled pending the final resolution of the trial.

[23] In considering an application for an interim payment, the court must direct itself in accordance with CPR Rules 17.5 to 17.7 which provide the governing framework for such relief, with rules 17.6(1) and 17.6(4) of the CPR, setting the parameters within which the court's discretion must be exercised. These rule as far as it is relevant states:

"Interim payments – conditions to be satisfied and matters to be taken into account

17.6 (1) The court may make an order for an interim payment only if –

- (a) *the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;*
- (b) *the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for judgment for any amount certified due on taking the account;*
- (c) ***the claimant has obtained judgment against that defendant for damages to be assessed;***
- (d) *(except where paragraph (3) applies), it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or*
- (e) *the following conditions are satisfied –*
 - (i) *the claimant is seeking an order for possession of land (whether or not any other order is also being sought); and*
 - (ii) *the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.*

(2)In addition, in a claim for personal injuries, the court may make an order for the interim payment of damages only if the defendant is –

- (a) a person whose means and resources are such as to enable that person to make the interim payment;
- (b) insured in respect of the claim; or
- (c) a public authority.

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

[24] A judge's power to order an interim payment under the rule is discretionary and limited by CPR Rule 17.6(4). Both parties acknowledge the limited judicial guidance from the Eastern Caribbean Court on the application of these provisions, particularly in relation to determining what constitutes a reasonable proportion of the likely final judgment for the purpose of ordering an interim payment. The parties both referred to jurisprudence of the English courts interpreting **Rule 25.7** of the Civil Procedure Rules of England and Wales 1988 (UKCPR).

[25] The UKCPR is similar in material respect to CPR **Rule 17.6**. Rule 25.7 (1) (b) and (4) provides:

“interim payments—conditions to be satisfied and matters to be taken into account

25.7—(1) The court may make an order for an interim payment only if—

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;

(c) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment; or

(d) the following conditions are satisfied—

(i) the claimant is seeking an order for possession of land (whether or not any other order is also sought); and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant’s occupation and use of the land while the claim for possession was pending.

(2) In addition, in a claim for personal injuries the court may make an order for an interim payment of damages only if—

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

(b) the defendant’s liability will be met by—

(i) an insurer under section 151 of the Road Traffic Act 1988(1); or

(ii) an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or

(c) the defendant is a public body.

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

[26] The English courts have developed guidance on the manner of exercising this discretion. The High Court in **Spillman v Bradfield Riding Centre**¹⁰, emphasized that

¹⁰ [2007] EWHC 89 (QB).

interim payments must not exceed the sum that the claimant could safely recover at trial. The Court articulated a three-stage approach: first, to assess, on the available evidence and with caution, the likely final award; second, to determine what proportion of that award may safely be paid now, minimizing the risk of overpayment; and third, to consider any relevant discretionary factors, including the claimant's need, the defendant's ability to pay, and potential hardship to either party.

[27] This approach was further clarified in **Re Stratos Club**¹¹ where Thompson J explained that the court need not attain certainty, or even a high degree of certainty, as to the final award. The rule requires only that the court reach a view as to the likely amount, and then determine what constitutes a reasonable proportion of that amount. The level of certainty informs the proportion that may safely be ordered: where the likely figure is clear, a larger proportion may be justified; where the assessment is less certain, prudence dictates a smaller proportion. The safeguard in Rule 25.7(4) therefore reflects little more than the common-sense position that the court should not make an order if it is likely to exceed the final award. Importantly, as the learned judge observed, the exercise does not require a "mini-trial" but an estimation, grounded in evidence, of a reasonable proportion of the likely final judgment.

[28] The learned authors of **McGregor on Damages** advance a view broadly aligned with that reasoning, while developing the principles governing the court's discretion. They emphasise that the touchstone is that no more than a reasonable proportion of the likely final judgment should be ordered though such proportion may be high potentially up to 90 per cent of the loss incurred, particularly where the estimate is conservative so and thus avoids the risk of overpayment. As they observe:

"No more than a reasonable proportion of the likely amount of the final judgment should be ordered. Nevertheless, a reasonable proportion may well be a high proportion, even 90 per cent of the loss incurred, although possibly limited to the loss at the time of payment, especially if the estimate is conservative so that there is no risk of overpayment... The better approach is to recognise that there is no such fixed limit. Provided that a conservative approach is taken, there is no reason that a court should not take into account special damages that are extremely likely to accrue

¹¹ [2021] EWHC 1008 (Ch) 4511 at [14].

between the date of the interim payment order and the date of the quantum trial. Nevertheless, the greater the degree of uncertainty, the less weight that the court should give to any such estimate, potentially with no weight at all to such amounts if there is any substantial uncertainty.”

[29] This passage underscores two points of principle: first, that there is no rigid numerical ceiling on what may constitute a “reasonable proportion”; and second, that the degree of certainty with which loss can be assessed is determinative of the proportion that may safely be ordered. A conservative valuation mitigates the risk of overpayment, thereby justifying a higher proportion of the claimant’s entitlement. Conversely, where the evidence leaves substantial uncertainty, prudence requires the court to reduce or even disregard estimates of loss that are not demonstrably secure.

[30] The Court of Appeal of England and Wales in **Eeles v Cobham Hire Services Ltd** (CA)¹², at p. 417, paragraph H reinforce the principle that the interim payment may be a high proportion of the estimated final award, but the overriding objective is to avoid any risk of overpayment rather than to deprive the claimant of funds to which he is plainly entitled.

[31] In **Newport**¹³ the Court of Appeal reaffirmed the importance of a practical approach when dealing with interim payment applications. The Court cautioned against allowing such applications to develop into protracted disputes on issues that properly belong to trial:

“I do not think it desirable that applications for interim payments should turn into long drawn out investigations into the very issues which are to form the subject matter of a future hearing. The wide discretion given to the court, coupled with the safety net for the defendants in rule 17, show that these applications should be decided on a fairly broad approach, with a minimum of expense to the parties”

and further “...on the material available to the court hearing the application, the court may be in a position to say “the plaintiff should recover at least £x and is likely to recover more or a great deal more”. In such a case, I do not think it would be wrong to say that £x itself is a reasonable proportion. In contrast, if the court can say “the plaintiffs should recover at least £x, but is

¹² [2010] 1 WLR 409.

¹³ [1981] 24 BLR 71.

unlikely to recover more” , then £x itself becomes the likely award and a reasonable proportion should be something substantially less than £x”.

- [32] The authors of **Zuckerman on Civil Procedure**¹⁴ explain that the procedure set out in UKCPR 25.6 and 25.7, ensures that a claimant with a clear right to a money judgment is not kept out of what is due to them by the necessity of quantifying the exact amount to which the defendant is liable.
- [33] The principle that emerges is this: where an applicant brings himself within the category of claim identified under rule 17.6(1), the discretion to order an interim payment is to be exercised on a cautious and conservative basis, so as to avoid any risk of overpayment, while at the same time ensuring that the claimant is not unjustly kept out of a reasonable portion of what is plainly his due. The jurisdiction is intended to be exercised broadly and practically, and not by way of a mini-trial. I accept that certain authorities pressed upon us by the appellants commend a structured three-stage methodology: first, estimating the likely final judgment; second, determining a reasonable proportion of that amount; and third, considering relevant discretionary factors. But it is equally clear that this framework is not to be applied with rigidity. Its utility will depend on the circumstances of the particular case, and where quantification is especially complex, a mechanistic application may be inappropriate. Crucially, difficulty in estimating the likely final judgment is not, in itself, a bar to an interim award. As the decision in **Newport** demonstrates, where the court can safely conclude that the claimant will recover at least a certain sum, and is likely to recover more, that “irreducible minimum” may properly form the basis for an interim payment.

Reasoning

- [34] In light of these principles, I turn to consider whether the learned judge erred in the exercise of his discretion in making the interim payment order challenged on this appeal. It is not in dispute that there is already judgment on liability in favour of the respondent, with damages left to be assessed. The respondent is therefore entitled, as a matter of principle, to be compensated in damages, and the only issue is the

¹⁴ Principles of Practice 4th Ed.

quantification of that entitlement. The jurisprudence makes clear that in such circumstances, the absence of complete certainty as to the final award is not a bar to the grant of an interim payment. The question for the Court is whether, on the evidence, there is a conservative figure, an irreducible minimum, which the claimant will recover at the trial of quantum.

The approach of the learned judge

[35] The learned judge delivered an *ex tempore* judgment, which is recorded at pages 182 to 219 of the transcript. At page 191, addressing his approach to arriving at an interim award he stated as follows:

“Now, the first point that one would identify here is that this seems to entail a two-stage process. First of all, once you're through the gateway of being satisfied that the Claimant has obtained a judgment, and everybody is through the gateway here, first of all, the Court has to consider what is the likely amount of the final judgment. Once the Court has done that, then the Court has to consider, if it considers that there is a likely amount of a final judgment that's going to be awarded, the Court has to consider what would be a reasonable proportion of that likely amount. So it would seem to be a two-stage process.

Now, nobody has suggested before me, and this is important that this Court needs to identify a figure or put a figure on the likely amount of the final judgment. Ideally, of course, in a clear case, one would expect the Court to say, yes, it is likely that the Court would award an amount of say \$80 million, \$100 million dollars, 200 million or whatever. But I think it is also clear, and there is authority for this proposition which Counsel can remind me of, that the exercise is not a scientific exercise..... and I think it is open to the Court to recognise that the Court can, is likely to award damages above a certain figure

Now, in this case the figures that are being bandied about as for the value, as to the value of Mr. Holm's 22 percent shareholding, they have greatly varied. The so-called irreducible minimum, the so-called irreducible minimum here is a very small proportion of the amounts which Mr., or amount that Mr. Holm could be awarded as the amount of the final judgment. Do I have to say he is likely to be awarded, say 80 million? I don't think I do for present purposes. I think it suffices to say that he is likely to be awarded a figure very considerably in excess of the 16 and a half million US dollars. And I point this out because Mr. Holm does not, in his application, come to the Court with a definitive figure for what he thinks the Court is likely to award him by way of a final judgment. In essence, perhaps, it might be said that this is working backwards and that one is proceeding from the basis that 16.5 million here is a reasonable proportion of whatever it is that the Court is likely to order by way of a final judgment, but in terms of numbers, I don't think it makes any difference. The

fact of the matter is, when you're dealing with the figure of US\$16.5 million being a small percentage of a much greater amount, we don't have to be overly concerned to identify exactly what that much higher figure is likely to be. So that is all I think I will say about the, what the CPR Rule, in fact says."

This is a case that the Court is satisfied that substantial damages will be awarded at the quantum trial, but it is indeed currently difficult to conclude accurately what sum will be recovered and therefore the authorities are that the assessment must be carried out on a conservative basis and the risk of overpayment avoided. That case is *AS v West Suffolk Hospital Trust*, an unreported case from the 1st of May, 2015.

And in this case I'm satisfied that there is no risk of an overpayment because the figure of, the base figure of \$12.5 million is the lowest of the low figure which is endorsed by the Defendants' own expert report. And that figure, on the evidence, is in fact detached from virtually all the other likely more relevant and higher data points that the experts identify. And the Defendants' own expert, in coming to that figure he relied solely upon actual market transactions which occurred in relation to the sale of shares and simple arithmetic. He didn't rely upon other more subjective and possibly variable analyses such as a cost approach or income-based approach, but he looked at what the market in the shares concerned actually did at relevant times

Now, it is being urged that I can't, in fact, do this exercise because I cannot identify a number of things, including, therefore, what the likely amount for the judgment will be but as was noted in the case of *Re Stratos Club* [2021] EWHC 1008 Chancery at Paragraph 14, in respect of the English CPR 25.74: "The provision does not, in my view, require certainty or even a reasonable degree of certainty over the amount of the final judgment. It requires the Court to reach a view on the likely amount of the judgment and then what is a reasonable proportion of that amount.

The two concepts are, in my view, related. If there is a fair degree of certainty on what is the likely amount, then a reasonable proportion might be quite a large proportion of that amount. If an amount can be named that is a likely amount but not a very likely amount then what would be a reasonable proportion of that amount would be less. Looked at that way, I'm not sure that the CPR 25.7(4) test adds much to the common-sense position that the judge should not order an interim payment unless the judge considers it is unlikely that the interim payment will not exceed the final judgment."

What we're not dealing with, and this is what the English cases are dealing with, is the possibility of awarding a high proportion, even 90 percent of the loss incurred. Here, what I think is very clear is that the proportion which is being proposed -- I believe, Mr. Levy, you might be able to refresh my memory, but did I hear something like 20 25 percent?..... 16.5 million out of 80 million, with 80 million being the figure being pitched out as the likely, or taken as the

likely figure that the Court might award. And while I'm on it, why might the Court or why is the Court likely to think in terms of 80 million? Because it is of the essence of the agreement between Mr. Holm and Mr. Wen who has always been the influential individual behind the promotion of Bank of Asia Project including sale of it, and shares of it, that they came to an agreement, or they spoke in terms of his shareholding being worth US\$80 million. So that's direct evidence. It's oral evidence, but it's direct evidence, and there's no evidence that I'd been taken to show that some other lower figure was agreed or contemplated between the parties. So it is direct evidence which the Court is able to take into account and nobody has said it's wrong.

In terms of the experts, whether they say is wrong, there are, of course, many ways upon which you can reach a figure using many data points, and that's where the value of using the Defendants' own expert comes in, and including the Defendants' own expert, professional, highly reputable expert's own minimum figure. So whether we treat 80 million as likely, it doesn't really matter. But I'm prepared to do so for present purposes given that there is evidence for it and there's no reason why the Court should depart from that. If I have to, I don't think I have to, but if I have to settle on a figure I would settle on a likely figure of 80 million."

[36] The learned judge recognised that, notwithstanding the absence of a definitive estimate from either party as to the likely quantum of the final award, the evidence before the court, particularly that adduced through the appellants' own expert, supported a conservative minimum valuation of US\$12.5 million for the respondent's 22% shareholding. The learned judge accepted that this figure represented, in his words, the "lowest of the low" valuation points, and noted that the interim payment sought of US\$16.5 million, remained a modest proportion of the broader range of valuations evident in the record, including a plausible upper bound of US\$80 million derived from unchallenged direct evidence of a shared understanding between the parties.

[37] While the learned judge did not undertake the kind of conservatively reasoned estimate of the likely final award contemplated in authorities such as **Eeles** and **Spillman**, he was alive to the challenges of doing so in the present case, given the nascent stage of the Project. He nevertheless approached the matter in a manner consistent with the reasoning in **Newport**. That decision makes clear that the difficulty of quantifying the likely final award ought not, in and of itself, to preclude the making of an interim payment, so long as the court can be satisfied that there is no real risk of overpayment.

The learned judge was plainly so satisfied. He observed that liability had already been determined in favour of the respondent and relying on the valuations submitted by the parties particularly the evidence of the appellants' own expert, he identified a base figure of US\$12.5 million as a secure foundation. Against that background, he was entitled to conclude that the interim award of US\$16.5 million being the base figure with interest thereon represented a conservatively assessed minimum recovery and would not exceed the amount ultimately awarded at trial.

- [38] The learned judge was plainly alive to the governing principles. He correctly reasoned that a mechanistic or formulaic approach is not mandated by the rule. The learned judge's assessment of the available evidence, combined with his recognition of the practical difficulty of arriving at a precise estimate, was principled and pragmatic. His approach falls comfortably within the range of outcomes properly open to a judge directing himself correctly in law. It was, in all the circumstances, a proper and proportionate exercise of the court's discretion under CPR 17.6. There was no misdirection as to principle, or perversity in the exercise of the learned judge's discretion.
- [39] The threshold for appellate interference with the exercise of a judicial discretion is, as this Court has repeatedly emphasised, a high one. It is not enough that an appellate court might have exercised the discretion differently; the Court must be satisfied that the decision under appeal was "plainly wrong". As this Court explained in **JTrust Asia PTE Ltd v Mitsuji Konoshita et al**¹⁵, interference is permissible only in limited circumstances. Those circumstances arise where it is shown that the judge, in exercising the discretion, erred in principle, either by failing to take account of relevant considerations, by attaching disproportionate weight to them, or by having regard to matters which were irrelevant and that, in consequence, the decision falls outside the generous ambit within which reasonable disagreement is possible, so as to be said to be plainly wrong. I have not so found. Consequently, there is no basis for appellate interference, and grounds 1 and 2 of appeal fail.

¹⁵ BVIHCMAP2020/0022 (delivered 31st May 2021, unreported).

Grounds 3 and 4 (Issue 3)

- [40] Grounds 3 and 4 argue that the judge failed to consider the respondent's refusal to plead or clarify his case on loss, select a date of valuation, or demonstrate both the loss and causation of that loss.

Appellants' submissions

- [41] The appellants submit that the respondent did not specify when or how his loss occurred, nor did he provide any evidence of a specific value for the loss. Therefore, the court cannot determine whether the damages sought is reasonable or likely to be awarded at trial. The respondent, at the time of the application, did not choose a date for valuation of his interest in the Project. Thus, the absence of a clear valuation date prevents the Court from assessing the likely damages that might be awarded at trial.
- [42] The appellants submit that the respondent's loss is based on a projected gain that could have been realized if the Project had been performed. However, since this gain has never materialized, the value of his loss is highly speculative and uncertain. They submit that they themselves have not realised value from their remaining shares since the breach. Therefore, the respondent has not necessarily suffered an identifiable loss, and his damages at the November 2024 trial could be nil. Without a fixed valuation date, a clear valuation method, or evidence of an actual gain, the court could not properly conclude, on a balance of probabilities, that the respondent is likely to establish damages of \$12.5 million, \$16.5 million, or \$80 million.
- [43] The appellants further argue that the appropriate date for valuation is 29th June 2016, when the respondent's involvement in the Project was terminated, and his interest had minimal value. They submit that the judge relied on 2018 expert reports to assess the likely damages. However, the appellants argue that these reports are outdated, cannot be used in the quantum trial, and fail to account for subsequent development.
- [44] The appellants contend that, at the time of the quantum hearing, the respondent like all other shareholders, would still be holding his shares, with no present loss, since any value depended on a future sale. The respondent has not been deprived of anything

yet, and his entitlement to gain would only arise when the market produced a transaction. They submit that if the learned judge had applied the proper three-step test in **Spillman**, he would not have ordered interim damages, or at least not US\$16.5 million, because it was unsafe and risked overpayment given the uncertainty of the respondent's eventual damages at trial. Consequently, the learned judge wrongly awarded interim damages of US \$16.5 million dollars, given the lack of clarity and evidence to support such an amount.

Respondent's submissions

- [45] The respondent submits that, in seeking interim damages, he deliberately avoided uncertainties surrounding the appropriate date of assessment and the scope of businesses comprising the Project. He did so by adopting a conservative approach: (i) applying what has been described as the "irreducible minimum" or "lowest-of-the-low" valuation across the entire period from breach to the present; and (ii) confining the assessment solely to the Bank of Asia, while excluding the value of other entities within the wider Bank of Asia Project. The fact that the interim award was calculated by reference only to the Bank of Asia, and not to the broader Project companies, reinforces the conclusion that the figure identified as the irreducible minimum was both cautious and safe.
- [46] The respondent submits that it is not the case that he has refused to identify a date for the valuation of the shares. The ability to plead or particularise a case on loss, including the selection of a valuation date, necessarily depends upon disclosure. As the learned judge correctly observed at the case management conference, it would have been inappropriate and procedurally unfair to require the respondent to commit to a valuation date before disclosure had been provided in the quantum phase of the proceedings. The valuation date depends on legal principles and on facts which were not yet available. The respondent submits that he considered all potential valuation dates, and the learned judge accepted the lowest valuation point to ensure a quantum that would not decrease.

[47] He further submits that there was no market to sell the shares at the breach date and he relied on **Hooper v Oates**¹⁶ where the court noted that a breach date is the right date for assessment of damages only where there is an immediately available market for the sale of the relevant asset, or in the converse case, for the purchase of an equivalent asset. Furthermore, the respondent argues that the court correctly rejected the breach date as the appropriate date for valuation, given there was no available market for the shares at that time. The respondent submits that the established principles of law set out in the case of **Marathon Asset Management LLP v Seddon**¹⁷ outline that the court should assess damages based on the date when the respondent could reasonably have mitigated his loss, which would typically be the quantum trial date unless mitigation could have occurred earlier.

[48] Further the respondent contends that the appellants' foundational reliance on the concept of "gain" is misconceived. The issue of causation is not predicated on a realized gain but on the respondent's deprivation of the contractual benefit, namely, the shares themselves. Consequently, quantifying the respondent's loss is not contingent on proving an actual sale of the shares, the loss flows from the failure to deliver the shares, not from a failure to realize a profit. The evidence does not suggest his loss is solely attributable to a lost opportunity to realize a profit.

[49] The respondent submits that the modern compensatory principle recognizes that damages encompass both actual loss and lost gain and that the concept of "gain" in the law of damages does not import any requirement that a claimant must prove an actual sale or realised profit. The respondent cited **Principles of European Law**¹⁸ which outlined:

"The general measure of damages is such as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed. Such damages cover the loss which the aggrieved party has suffered and the gain of which it has been deprived"

¹⁶ [2013] EWCA Civ 91.

¹⁷ [2017] EWHC 300 (Comm).

¹⁸ Principles of European Contract Law (Kluwer Law International 2002) art 9:502.

[50] The respondent also relied on the dicta of Lord Scott in **Golden Strait Corp v Nippon Yusen Kubishika** (*The Golden Victory*)¹⁹ where he explained that the guiding principle is that damages should represent the value of the contractual benefits of which the claimant has been deprived by reason of the breach, no less, but also no more. He also referenced the decision of the English Court of Appeal in **Hooper v Oates**²⁰ which reinforced this approach in circumstances where an asset had not been sold, and the claimant's loss has not crystallised. The decision confirmed that the absence of a realised gain does not negate the existence of a compensable loss.

[51] The respondent submits that the assessed loss lies in the deprivation of the shares he was contractually entitled to receive, and that loss is to be assessed by reference to their value, irrespective of whether he would have sold them. Consequent on the breach of contract he does not hold any shares and therefore has been unable to opportunistically monetise his stake as the appellants have. He submits that damages are to be assessed such that he, in so far as money can do it, be placed in the same situation, with respect to damages, as if the contract had been performed.

[52] The appellants' argument that because they themselves have not sold their shares the respondent has suffered no loss is, he submits, irrelevant. His claim is not to a proprietary interest in their shares, but to damages for breach of contract. The learned judge, he contends, did not err in law or in fact, he took account of the respondent's pleaded case on loss, the evidence advanced in support of it, and the submissions made at the hearing, and applied the governing principles to reach a cautious and principled conclusion.

Discussion

[53] The appellants contend that the respondent's application for interim damages was fundamentally flawed. They submitted that the respondent had failed to identify with precision what was to be valued, at what point in time, or how he would have dealt with

¹⁹ [2007] 2 AC 353 at [36],

²⁰ [2013] EWCA Civ 91.

the shares but for the breach. On that basis, they argued, the court was not in a position to undertake the interim damages exercise and could not properly be satisfied that the respondent would obtain damages at trial.

The findings of the learned judge

- [54] The learned judge rejected that contention. He found that the subject of the valuation was already clear; the respondent's 22% interest in the Bank of Asia project, as established by the liability judgment. As to the appropriate valuation date, he held that it was "almost certainly not the date of breach," noting that there was no available market for the shares at that time. Citing **Marathon Asset Management**, he reasoned that the proper approach was to assess damages at the date of the quantum trial, unless it could be shown that the claimant ought reasonably to have mitigated earlier by seeking alternative performance.
- [55] The judge further held that the absence of a ready market or a fixed date when the shares could have been realised was not fatal. In such circumstances, damages could be assessed as at the quantum trial, since pursuing damages through litigation is itself a legitimate means of mitigation. He considered the evidence before the court, including the appellants' attempts to market the Bank of Asia project and Mr. Wen's 2017 contract valuing the project at approximately US\$420 million. This evidence, he concluded, undermined the appellants' submission that the shares were merely speculative or worthless.
- [56] At pages 223–224 of the record, the learned judge went on to find that there was no basis on which the court at trial would ascribe a value of less than US\$16.5 million to Mr. Holm's 22% shareholding. He reasoned that the respondent's entitlement carried real value, and its deprivation amounted to compensable loss. Relying on the appellants' own expert, Mr. Ellison, who had assessed the shares between US\$12.2 and US\$12.9 million, the judge identified a conservative "floor" valuation of US\$12.5 million. When the time value of money was added by way of interest, this yielded the figure of US\$16.5 million, which the learned judge considered just and fair as an interim award.

Legal principles

- [57] The respondent's entitlement to damages flowed from the liability judgment, which confirmed the validity of the BVI Contract and his right to a 22% interest in the Bank of Asia's apex company.
- [58] The normal measure of damages for breach of contract at common law in the Virgin Islands, as in England, is compensatory: the object being to place the innocent party, so far as money can do, in the position he would have occupied had the contract been performed. This principle, authoritatively expressed in such leading cases as **Johnson v Agnew**²¹ and **Robinson v Harman**²² underpins the entire law of damages for breach of contract. In this case the breach arose from the appellants' failure to execute, or procure the execution of, the necessary documents to give effect to the BVI Contract, under which the respondent would be a holder of a 22% interest, subject to dilution in the apex company of the Project. Both parties accept that the general rule is that damages are assessed as at the date of breach. But that rule is not inflexible, and the courts have long recognised circumstances in which departure from it is justified.
- [59] The learned authors of *Chitty on Contracts*²³ state that while the normal rule is to assess damages at the time of breach, the rule is applied with "a good deal of flexibility," particularly where the claimant has deferred reacting to the breach for good reason. The authors observe that although the date of breach is ordinarily the reference point, it is "not an absolute rule: if to follow it would give rise to injustice the court has power to fix such other date as may be appropriate in the circumstances."
- [60] Lord Wilberforce in **Johnson v Agnew**²⁴ explained that the breach-date rule is rooted in the compensatory principle but is not absolute. If rigid application would produce injustice, for example, where there is no ready market at the date of breach, or where

²¹ [1980] AC 367 at 387

²² (1848) 1 Exch 850,855

²³ H G Beale and J Chitty (eds), "*Chitty on Contracts*" (31st edn, Sweet & Maxwell 2012) at 26-014, 26-086.

²⁴ [1979] 1 All ER 883 at 896, [1980] AC 367 at 400–401

the innocent party has reasonably continued to pursue performance, the court may adopt another date. He cited *Ogle v Earl Vane* (1867) LR 2 QB 275, *Hickman v Haynes* (1875) LR 10 CP 598, and *Radford v de Froberville* [1977] 1 WLR 1262 as examples of cases where damages were assessed by reference to a date other than the date of breach, in order to do justice.

[61] In **Hooper v Oates**, a case referenced by the respondent, Lloyd LJ observed:

“It seems to me that the breach date is the right date for assessment of damages only where there is an immediately available market for the sale of the relevant asset or, in the converse case, for the purchase of an equivalent asset.”

And in **Marathon Asset Management LLP v Seddon**²⁵

“The ‘rule’ that damages for breach of contract– when awarded in the ordinary way as compensation for loss– should normally be assessed at the date of breach is based on the assumption that there is an available market in which the injured party can immediately obtain a substitute for the defendant’s performance in order to mitigate its loss”

[62] In **Techno Land Improvements Ltd v British Leyland (UK) Ltd**²⁶, a case referred to by in **Hooper and Oates**. Goulding J held that the court is not required to shut its eyes to facts occurring after the breach, the commencement of proceedings, or even a liability judgment, if those facts assist in quantifying the claimant’s actual loss more accurately.

[63] These authorities establish that the breach-date rule is best understood as a starting point, particularly apt where there exists an immediately available market substitute. Where none exists, or where rigid application would unfairly depress compensation, the court retains discretion to identify a date more consistent with the compensatory principle.

Application to the present case

²⁵ [2017] EWHC 300 (Comm) at paragraph 250.

²⁶ [1979] 2 EGLR 27.

- [64] In the present case, it was common ground that no market existed for the Bank of Asia shares at the date of breach. The project was still at an early stage, and the value of the respondent's interest lay in its developmental prospects. To insist upon a breach-date valuation would have artificially depressed the respondent's compensable loss. The learned judge was therefore entitled to reject that approach. On the expert evidence, he found that a conservative minimum value of US\$12.5 million could safely be attributed to the respondent's 22% holding, a figure consistent with the appellants' own expert's assessment. He also noted the prolonged passage of time, nearly seven years since the breach, during which the respondent had received neither damages nor reimbursement of litigation costs, which were estimated at US\$6 million. In those circumstances, the grant of an interim award was both fair and justified, and the sum arrived at represented a safe irreducible minimum supported by the evidence.
- [65] The appellants' reliance on the strict breach-date rule has a superficial attraction but ignores the flexibility inherent in the compensatory principle and the discretion conferred by CPR 17.6. An application for an interim payment, requires that the court identify a conservative and recoverable minimum. The learned judge did so, finding that an irreducible minimum of US\$12.5 million could properly be placed on the respondent's 22% interest in the Bank of Asia, excluding any value attributable to the wider project. This figure was entirely consistent with the valuation range of US\$12.2 to US\$12.9 million put forward by the appellants' own expert, Mr. Ellison, who relied upon actual market transactions and straightforward arithmetic. The appellants themselves acknowledged that the respondent's shares were not worthless, though they contended that their precise value could not yet be ascertained.
- [66] Equally, I do not accept the appellants' argument that the absence of a realised gain precludes loss. I accept the respondent's submission on this point. The deprivation of the contractual entitlement to shares is itself a compensable loss. This is consistent with the modern compensatory principle reflected in the **Principles of European Law** and endorsed in **Golden Victory**, authorities cited by the respondent.

[67] The appellants' reliance on their own retention of shares does not assist them. Their ability to hold their shares indefinitely has no bearing on whether the respondent has suffered loss. The breach deprived him of the very shares to which he was contractually entitled.

[68] In my judgment, the learned judge neither erred in principle nor in fact. Confronted with the absence of a market and the uncertainties inherent in fixing a valuation date, he adopted a conservative "lowest-of-the-low" approach, thereby ensuring that the interim payment would not exceed a safe minimum. The award of US\$16.5 million was firmly grounded in the evidence, consistent with the appellants' own expert valuation, and fully in keeping with the requirements of CPR 17.6. It reflected both a proper application of legal principle and a careful assessment of the factual circumstances, including the protracted delay in compensating the respondent. The appeal on grounds 3 and 4 is accordingly dismissed, and the learned judge's order is affirmed.

Grounds 5, 6 and 7 (Issue 4)

[69] The appellants contend that the learned judge fell into error in making an order for interim damages notwithstanding their asserted inability to pay, and in circumstances where there was, in their submission, no evidence of financial hardship on the part of the respondent. They argue that any award of damages ought properly to have been deferred to the trial, where the quantum of loss could be the subject of a full and proper assessment.

Appellants' submissions

[70] The appellants submit that **Spillman** requires a judge to perform a balancing exercise, considering the interests of all the parties, including the financial position of the appellants. They submit that the learned judge failed to consider that the appellants could not afford to pay the interim damages, which could only be paid if they sell their interest in the Project which included within it the respondent's interest. This had not been possible due to a lack of a realizable market since the breach. The appellants submit that any interim order made would stifle their ability to continue the Project and

therefore would be contrary to the respondent's own interest. The order to pay interim damages would also stifle their ability to fund their defence of the proceedings.

[71] The appellants also submit that the respondent has suffered no financial hardship in awaiting the determination of the quantum trial. They contend that the respondent has not in fact suffered any compensable "loss" to date, nor has he demonstrated prejudice arising from being held out of damages. They state that the respondent had not been in employment for some five years prior to his involvement with the Project and therefore gave up nothing of substance in taking up that role. Following the termination of his engagement, he always has been free to pursue other ventures and earn income elsewhere yet appears to have taken no steps to do so. The appellants rely on **Ricci Burns Ltd v Toole**²⁷, and the dicta of Ralph Gibson LJ where he explained:

"the underlying purpose [of an order for interim damages is] the mitigation of hardship or prejudice to a plaintiff which may exist during the period from the commencement of the action until trial"

[72] The appellants further submit that the respondent has not suffered prejudice of the kind contemplated by the authorities. They point out that the respondent has benefited from third-party litigation funding, such that he has not himself borne the expense of these proceedings. On this footing, they contend that he cannot properly argue that he requires an interim award to meet the ongoing costs of litigation, since that burden does not fall upon him. In addition, they emphasise that the respondent is already protected by a worldwide freezing order, the value of which, they argue, far exceeds both the interim damages awarded and the likely maximum damages recoverable at trial. In their submission, this injunction is sufficient to safeguard his position as to enforcement, thereby removing any justification for the grant of interim damages.

[73] The appellants therefore contend that the learned judge failed to undertake the proper balancing exercise between the potential prejudice to each side. In their submission, the judge gave insufficient weight to their inability to pay and the prejudice they would suffer from an order they could not meet. They maintain that they lacked, and continue

²⁷ [2005] EWHC 567 (QB).

to lack, the funds to comply with the interim award. Accordingly, they argue that the proper course would have been to defer any assessment of damages until trial, rather than to order payment of any sum by way of interim damages.

Respondent's submissions

[74] The respondent submits that his entitlement to interim damages was based on the likely outcome of the trial and not the appellants' financial position. He submits that such a proposition is counter-intuitive, it is no principle of law that a liable defendant should not be ordered to pay damages simply because they assert an inability to pay the amount ordered. The respondent cites the case of **Jordan v Geason**²⁸ where the court gave little weight to the defendant's financial position. Although the defendant's means were considered, the evidence adduced was found to be unreliable. The court therefore held that his financial circumstances could not operate to reduce or affect the amount of the interim payment.

[75] The respondent also placed reliance on **Schott Kem Ltd v Bentley**²⁹ in which Neill LJ observed that there is no restriction implicit in the rules which prevents an interim payment order being made in the absence of evidence of need or prejudice. On this footing, the respondent submits that if the appellants wished to rely on alleged impecuniosity, they were obliged to place before the court proper and reliable disclosure to substantiate such a claim. Before the court below, however, there was nothing beyond the bare assertions of Mr. Wen as to financial hardship. No evidence was produced from which it could properly be concluded that a substantial interim award of damages or costs would either stifle the appeal or prejudice the appellants' ability to defend the proceedings. Nor did the appellants at any stage provide evidence of what, if anything, they might be able to pay, nor did they seek an extension of time to meet any part of the interim order, despite being expressly invited by the court to do so. In these circumstances, the learned judge was entitled to conclude that the respondent's

²⁸ [2007] EWHC 2270 (TCC).

²⁹ [1996] 1 WLR 1008 (CA).

continuing loss from the delay outweighed the appellants' unsubstantiated claims of financial difficulty.

[76] The respondent submits that the appellants' reliance on the dictum of Ralph Gibson LJ in **Ricci Burns Ltd v Toole**³⁰ is misplaced and plainly distinguishable. In **Schott Kem Ltd v Bentley**, Neill LJ, sitting in the English Court of Appeal, considered **Ricci Burns** and observed that it was concerned with the jurisdiction to grant interim payments in personal injury cases under Ord. 29, r.17 RSC, a rule which expressly required the court to take into account the applicant's need or hardship. By contrast, no such requirement is imposed under the CPR. The respondent therefore contends that there is nothing in the CPR Rule 17, to suggest that an interim payment may only be made where the applicant demonstrates financial hardship or need. On the contrary, the jurisdiction is not circumscribed in that manner, and an applicant is not required to show that he or she would suffer prejudice if an interim payment is not ordered.

[77] The respondent submits that there can be no question that the delay to recovery is a real prejudice to him. At the time of the hearing before the lower court, it had been over 7 years since the appellants' breach of contract, and nearly 7 years since the respondent commenced the proceedings before the lower court and almost 5 years since his right to damages to be assessed was established by the Trial Judgment. The respondent submits that the learned judge was correct in his finding that the prejudice to the respondent caused by a further delay in compensation for his loss outweighed the financial hardship assertions of the appellants which were entirely of their own making.

The learned judge's findings

[78] The learned judge's discussion of the issues of prejudice to the appellant is contained at page 224 and 225 of the record. He said:

"The fact that the Defendants are said not to be able to pay is completely irrelevant to the figure that Mr Holm is entitled to claim an interim payment, and he is, and he succeeded in moving the Court to vindicate that entitlement with an order. The Defendants cannot pay is neither here nor there. That can be compensated for in other ways. That Mr. Holm will not be able to repay, well,

³⁰ [1989] 3 All ER 478 at [44]

there's no evidence of that. So, in my respectful judgment, unless there's anything that I've missed, that covers the points and the application therefore succeeds."

- [79] The learned judge made the important observation that the exercise before him was essentially to anticipate, so far as reasonably possible, the determination that would inevitably be made at the quantum trial. In that context, he remarked that whether the payment of damages was ordered at the interim stage or a year later at trial "does not make a blind bit of difference." What the court was concerned with, in his view, was not the timing of the payment but its underlying justification and once satisfied that the respondent was plainly entitled to a certain minimum sum, the judge considered that the award could properly be made without awaiting the final determination of quantum.

Discussion

- [80] I accept the respondent's submission that, on a proper construction of CPR Rule 17.6, a claimant is not required to establish financial necessity, nor is the court bound to consider potential prejudice to a defendant, as a precondition to granting an order for interim payment. The rule is cast in broad terms, the only express limitation being contained in Rule 17.6(2). That provision is confined to claims for personal injury, where the court may only order an interim payment if the defendant has the means and resources to do so, is insured in respect of the claim, or is a public authority. No similar reservation exists in respect of other causes of action, and it is plain that the rules do not contemplate any general obligation on the court to investigate the means of a defendant outside the personal injury context. Rule 17.6 (2) provides:

"(2) In addition, in a claim for personal injuries, the court may make an order for the interim payment of damages only if the defendant is –

- a. **a person whose means and resources are such as to enable that person to make the interim payment;**
- b. insured in respect of the claim; or
- c. a public authority.(emphasis mine)"

- [81] The appellants' reliance on hardship as a threshold condition is therefore misplaced. As Neill LJ explained in **Schott Kem Ltd v Bentley**, the English provision under Ord. 29, r.17 of the Rules of the Supreme Court was confined to personal injury claims, where

the rule expressly mandated consideration of need. No such limitation is incorporated into CPR 17.6.

[82] The essential questions are whether the claimant has established a clear entitlement to damages and whether the court can identify a reasonable proportion of the sum likely to be recovered at trial. The learned judge answered both questions in the affirmative, and in doing so acted squarely within principle.

[83] Equally, the appellants' reliance on the dictum of Ralph Gibson LJ in **Ricci Burns** is misplaced. That case arose under RSC Ord. 29 r.17 in the former RSC regime, where the jurisdiction was limited to personal injury claims expressly requiring consideration of financial hardship. Under CPR 17.6, neither hardship nor need is a precondition.

[84] To the extent that **Spillman** prescribes a three-stage approach, first, to identify the likely amount of the final judgment; second, to assess a reasonable proportion of that amount; and third, to weigh any other relevant discretionary factors, the third stage is necessarily conditioned by the provisions of CPR 17.6. That rule expressly reserves consideration of a defendant's financial means to claims for personal injury. In all other cases, including the present, the rule does not import any general requirement that the court undertake an enquiry into the defendant's financial capacity to comply with an interim order. It follows that impecuniosity, even if asserted, does not operate as a bar to the making of an interim award in non-personal injury claims.

[85] The learned judge also found no evidence to support the appellants' assertion of financial inability to comply with an interim order. He concluded that where liability had already been determined against them, and only quantum remained for assessment, their alleged impecuniosity was of little relevance. In my judgment, that conclusion cannot be faulted. Once liability had been established, the respondent was entitled, in principle, to a monetary award reflective of his loss. The interim payment jurisdiction under CPR 17.6 exists to ensure that a claimant is not unfairly kept out of what is plainly his due. It follows that the learned judge was right to regard the appellants' unsubstantiated claim of impecuniosity as irrelevant to the exercise of his discretion, and

to proceed on the basis that the respondent should not be prejudiced by further delay in the receipt of damages.

- [86] Further the appellants' submissions as to the respondent's employment history, alleged inactivity, or litigation funding are, at best, peripheral. They do not go to the core enquiry mandated by the rule. It follows that the appellants' argument that the judge failed to balance the prejudice to both sides is unsustainable. The appeals under grounds 5,6,7 are equally dismissed.

Ground 8

- [87] Ground 8 of the appeal raises no issue that properly calls for appellate determination.

Disposition

- [88] For the reasons given, this appeal is dismissed. The stay of execution previously granted is hereby lifted. The respondent is awarded his costs of the appeal, such costs to be assessed if not agreed.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Darshan Ramdhani
Justice of Appeal (Ag.)

By the Court

Chief Registrar

