Neutral Citation Number: [2022] EWCA Civ 236

Case No: CA-2021-000492-F
(formerly A4/2021/0484)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Sir Michael Burton GBE
[2021] EWHC 295 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

Before :

LORD JUSTICE MALES
and
LORD JUSTICE WARBY

- -

Between :

HELIOS ORYX LIMITED	**Claimant/ Respondent**
- and –	
TRUSTCO GROUP HOLDINGS LIMITED	**Defendant/ Appellant/**

- -
- -

Philippa Hopkins QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellant**
Clare Reffin (instructed by **Stevens & Bolton LLP**) for the **Respondent**

Hearing date: 10 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 25 February 2022.

LORD JUSTICE WARBY:

1. This is an application for relief from sanctions following the dismissal of an appeal for non-compliance with an unless order. If relief is granted, the appellant seeks an order discharging or varying the order with which it failed to comply. At the end of the hearing we announced our decision to refuse the application. These are my reasons for joining in that decision. I would refuse relief from sanctions. That makes it unnecessary to determine the application to vary. But as I have had to consider the merits of that application for the purpose of deciding on relief from sanctions, I can say that I would have refused it.

The procedural history

2. The claimant ("Helios") is an investment company. The defendant ("Trustco") is a Namibia-based conglomerate. The parties entered into a facilities agreement. Helios brought a claim in the Commercial Court for repayment under the agreement. Trustco counterclaimed. On 20 January 2021 Sir Michael Burton GBE, sitting as a Deputy Judge of the High Court, entered summary judgment for Helios on its claim and struck out Trustco's counterclaim. Shortly before the hearing, Trustco had parted company with its lawyers. At the hearing it was represented by its CEO, Dr van Rooyen.

3. On 13 May 2021, Males LJ gave Trustco conditional permission to appeal against the dismissal of its counterclaim. Males LJ concluded that although the counterclaim that had been pleaded was not arguable, and he had not been persuaded that there was any other arguable counterclaim, it was arguable that the hearing in the court below had not been fair. But Males LJ considered it important in these circumstances that security for the claim should be given. Applying the principles set out by Christopher Clarke LJ in *Merchant International Company Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2016] EWCA Civ 710 [37], he granted permission on a condition set out in paragraph 3 of the order. This was that Trustco must by 11 June 2021 (a) pay into court the sum of US $21,380,334 and (b) pay Helios' solicitors the sum of £118,000.

4. The sterling amount is the costs which the Judge ordered Trustco to pay. We are not concerned with that aspect of the order. That is because Trustco has paid (and Helios has accepted) the equivalent of that sum in Namibia, using Namibian currency. This application is about paragraph (a) of the condition. The dollar amount represents the majority of the relief ordered by Sir Michael and has been referred to as "the USD Judgment sum". It is that aspect of the condition that has been referred to as "the PTA Condition", and I shall adopt that shorthand.

5. On 28 May 2021, Trustco applied for an order varying the PTA Condition by directing that it be treated as having been satisfied already. In support of that application, Trustco maintained that Helios was sufficiently secured by reason of an existing mortgage over land in Namibia ("the Namibian Mortgage") that had been provided by a subsidiary of Trustco known as EPDC to secure its obligations as guarantor of the facilities agreement. In the alternative, Trustco sought an extension of time for complying with the PTA Condition until 30 days after the grant of exchange control approval for the transfer of funds. Trustco's evidence was that it had experienced difficulty in obtaining the exchange control approval from the Bank of Namibia ("the Bank") which it said was necessary for it to comply with the PTA Condition.

6. On 11 June 2021, Males LJ extended the deadline for compliance with the PTA Condition pending a decision on Trustco's application. On 15 July 2021, he heard and decided that application, giving an extempore judgment ([2021] EWCA Civ 1845). He did not regard the Namibian Mortgage as sufficient security and hence refused to treat the PTA Condition as satisfied. He also refused to grant the open-ended extension of time for compliance with the PTA Condition that Trustco had sought. He gave three main reasons for this: the evidence was unclear as to whether exchange control approval was required; Trustco had "done nothing to seek such permission"; and since Trustco had only obtained permission to appeal by leading Males LJ to believe that it would be able to provide security in this jurisdiction, that was and remained "the appropriate and just way for this appeal to proceed."

7. Males LJ decided that he would (1) further extend time for payment into court of the USD Judgment Sum to 30 October 2021; (2) vary the PTA Condition by providing for alternative ways of securing the USD Judgment Sum until the end of the proceedings (by paying it into a client account of Trustco's solicitors or by providing a bank guarantee); and (3) require Helios to undertake that upon Trustco providing security in accordance with the PTA Condition as now varied Helios would release the Namibian Mortgage and terminate proceedings it had brought against EDPC in Namibia. Males LJ went on to say this:

> "39. Subject to those three points, and on the assumption that the undertaking will be given, I refuse this application. If the security is not provided by 30th October 2021 and no application is made, this appeal will stand dismissed without further order.
>
> 40. I will give liberty to apply, but I make clear that any application is highly likely to fail, unless there is clear evidence that exchange control permission is likely to be obtained within a short time. I will, if necessary, deal with any such application on paper.
>
> 41. I will give Helios 24 hours to decide whether it is, in principle, prepared to give the undertaking to which I have referred. …
>
> 42. Meanwhile, the respondent need take no further step in the appeal until 21 days after the security is provided."

8. On 16 July 2021, Helios provided the necessary undertakings. These were duly recorded in the order that was drawn up and dated 30 July 2021 to record Males LJ's decision ("the July Order"). Paragraph 2 of the July Order was in these terms:

> "Unless [Trustco] has complied with the PTA Condition as varied by paragraph 1 above, its appeal will stand dismissed on 31 October 2021 without prejudice to the right of [Helios] to obtain a sealed order of this court dismissing the appeal."

Paragraph 7 read simply: "Liberty to apply".

9. There was no application for permission to appeal against the July Order.

10. On 28 October 2021, Trustco's solicitors sent the court a six-page letter, the stated purpose of which was "to inform the Court that, regrettably, Trustco has not been able to satisfy the [PTA Condition]" and that it was "unable to provide Security in the terms of the Court's order." The letter gave an account of the procedural background, and "Trustco's efforts to comply with varied PTA Condition". It concluded with a restatement of Trustco's position, namely that the hearing before Sir Michael Burton was unfair; his order should not stand; the Namibian Mortgage was adequate alternative security, which it was still open to Helios to accept; and that "as previously submitted, Trustco believes that it would be gravely prejudicial for it to provide the 'double' security as detailed above, in order to proceed with its appeal."

11. On 29 October 2021, Males LJ made the following observations, which were conveyed to Trustco by email that evening:

> "I have considered the letter from Quinn Emanuel dated 28 October 2021.
>
> As I read the letter, it is written for information to explain that security has not been and will not be provided, rather than to make any application to vary my previous order. However, for the avoidance of doubt, I see no justification for any such variation. While Trustco will be unable to pursue its appeal, and to that extent will suffer prejudice, the respondent Helios would be prejudiced if the appeal were to proceed without security being given. I have previously determined where the balance of prejudice lies and the position has not materially changed.
>
> Accordingly I am not prepared to vary my previous order. The result is that the appeal will stand dismissed."

12. On 31 October 2021, Trustco's appeal was dismissed automatically pursuant to paragraph 2 of the July Order.

13. On the afternoon of Wednesday 24 November 2021, Trustco's solicitors emailed the court with an application for permission to appeal to the Supreme Court against "the decision of Males LJ on 29 October 2021 in this appeal". The email noted that time for applying for permission to appeal expired two days later, on Friday 26 November 2021, and asked for the application to be placed before Males LJ as soon as possible. The letter of application explained that Trustco had written the letter of 28 October 2021 "to update the Court, and because it understood that, pursuant to CPR 52.18(c), it was prohibited from making a further application to vary the PTA Condition".

14. Rule 52.18 is the rule that (among other things) empowers the Court of Appeal to vary the conditions on which an appeal may be brought. The letter was evidently referring to rule 52.18(3), which provides that "where a party was present at the hearing at which permission was given, that party may not subsequently apply" for such an order. So Trustco's position was that it had not applied to vary because it had no right to do so, but it was nonetheless entitled to appeal because Males LJ had considered whether to vary and decided not to.

15. Trustco's application for permission to appeal was not determined at that time because on Thursday 25 November 2021, the Master of the Court of Appeal directed as follows:

> "Notwithstanding the provisions in rule 52.18(3), I consider the appropriate application in these circumstances would be an application for relief from sanctions…".

16. On 2 December 2021, Trustco filed an application notice making the twin applications mentioned at the start of this judgment.

The application

17. It is convenient to set out the terms of the orders sought:-

> "1. Pursuant to CPR 3.9, an order relieving the Appellant from sanctions, namely the removal of its appeal from the List and the appeal's standing dismissed, following its inability to comply with paragraph 1 of the order of Lord Justice Males dated 30 July 2021 (the "**Order**"), as confirmed by Lord Justice Males on 29 October 2021.
>
> 2. Pursuant to the liberty to apply contained in the Order, an order that:-
>
> (a) paragraphs 1, 2, 3 and 4 of the Order be set aside; and
>
> (b) the condition on the Appellant's permission to appeal under paragraphs 2 and 3 of the order of Lord Justice Males dated 13 May 2021 be dispensed with."

18. In support of the application Trustco filed the Fifth Witness Statement of its solicitor Liesl Fichardt ("Fichardt 5"). In response Helios filed a witness statement of its solicitor Andrew Quick ("Quick 4"). The Court permitted Trustco to file a witness statement in reply from Ms Fichardt ("Fichardt 6").

The relevant procedural framework

19. Trustco says that we should start with its application for relief from sanctions and, having granted that, move on to the application to vary.

20. On this approach the starting point is CPR 3.8(1), which provides that "where a party has failed to comply with a … court order, any sanction for failure to comply imposed by the … court order has effect unless the party in default applies for and obtains relief from the sanction." In this case, as is common ground, that means that Trustco's appeal has been dismissed. It also means that this will remain the position unless Trustco's application for relief from sanctions is granted. CPR 3.9(1) lays down the approach to an application for relief from sanctions:

> "… the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders."

21. In *Denton v T H White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 [24]-[38] this Court provided guidance on how CPR 3.9(1) should be given effect. The court should

approach the matter in three stages. The first stage is to assess the seriousness and significance of the failure to comply that triggered the sanction. The second stage is to consider why the default occurred. At the third stage, the court considers all the circumstances of the case, giving particular weight to the two factors highlighted in the rule, dubbed "factors (a) and (b)". An application for relief will not fail automatically if there is a serious or significant breach for which there is no good reason. True, "the more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it … But it is always necessary to have regard to all the circumstances of the case." These relevant circumstances include the promptness of the application and other past or current breaches.

22. Procedural rules of relevance to the second limb of Trustco's application include CPR 3.1(7) and CPR 52.18. Rule 3.1(7) sets out one of the court's general case management powers. It provides that "A power of the court under these rules to make an order includes a power to vary or revoke the order." I have already summarised rule 52.18, which contains a power to vary conditions on the grant of permission to appeal but sets a limit on that power.

A preliminary question

23. It is not agreed that these are the only relevant procedural rules. Helios says that because the appeal has already been dismissed, the correct starting point is not the jurisdiction to grant relief from sanctions but the jurisdiction to re-open an appeal that has already been determined, so that the case is governed by CPR 52.30.

24. That rule is headed "Reopening of final appeals". Its purpose is to regulate the exercise of the power identified and explained in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, where the Court of Appeal held that it has an implicit jurisdiction to reopen an appeal even after it has been finally determined. This is a truly exceptional jurisdiction. The substantive conditions for its exercise are stringent: see r 52.30(1) and the jurisprudence summarised in *Ceredigion Recycling & Furniture Team v Pope* [2022] EWCA Civ 22 [41]-[46]. The applicant must show a powerful probability of a significant injustice. To do so, it is necessary to show – for instance – that the court failed to grapple with the issues before it, or that the process has been "vitiated or corrupted" by some "obvious and egregious error", or that the "integrity" of the proceedings has been "critically undermined". The procedural conditions are also stringent: an application can only be brought with permission; it is dealt with "on paper" with no right to an oral hearing; and there is no right to any appeal or review: CPR 52.30(4) and (5).

25. If Helios were right on this point, that would be the end of the matter: there has been no application for permission to seek an order re-opening the appeal, the time for doing so has expired, there is no application to extend time, and although Ms Hopkins QC bravely suggested in oral argument that the facts and circumstances on which Trustco relies to justify relief from sanctions meet the CPR 52.30 standard, that is plainly not the case even taking them at their highest.

26. For my part, however, I do not find Helios' procedural argument convincing. It is unsupported by authority, and hard to reconcile with such authority as exists. *McWilliam v Norton Finance (UK) Ltd* [2014] EWCA Civ 818 [10] and *Michael Wilson & Partners, Ltd v Sinclair* [2015] EWCA Civ 774, [2015] 4 Costs LR 707 [42] both

suggest that CPR 52.30 applies where an appeal has been "determined" on its merits, but not where it has been dismissed by some other procedure. In such a case resort can be had to other, less demanding, procedural mechanisms. I do not find it easy to distinguish these cases. Their reasoning also seems to me consistent with the judgment in *Taylor v Lawrence* and the overall procedural regime. It is striking to reflect that if Helios were right CPR 3.9 could have no practical application to a case where an appeal was automatically dismissed for a failure to comply that was excusable and neither serious nor significant.

27. But I do not think we need to reach any definitive conclusion on these issues, or explore them further, because Trustco fails even on the more favourable procedural analysis for which it contends.

Relief from sanctions

28. Application of the familiar three-stage test to the facts and circumstances of this case leads me to the clear conclusion that relief should be refused. At all three stages, the burden of proof and persuasion lies on Trustco. In my view it has failed to discharge that burden. Trustco (1) concedes that the default which led to the dismissal of its appeal was both serious and significant; (2) has failed to show that it had any good or reasonable excuse for that default; and (3) has entirely failed to persuade me that in all the circumstances of the case it would be just or appropriate to grant relief.

29. The central issue, on which both Counsel rightly focused their attention, is whether Trustco has made out its case that non-compliance was due to an "inability" to comply with the PTA Condition.

30. Trustco accepts, indeed asserts, that it has ample resources. Its argument has the following main steps: (1) all its liquid assets are in Namibia; (2) compliance with the PTA Condition required exchange control approval from the Bank; (3) the prescribed method for obtaining such approval is a recommendation from an authorised dealer; (4) although Trustco has made efforts to obtain approval by this means; (a) an essential pre-requisite, in the circumstances of this case, is an order of the Namibian courts recognising the relevant English judgment and order; (b) Helios has not applied for recognition, and Trustco has no right to do so; (c) "accordingly [the authorised dealer] was not able to recommend to the Bank" that exchange control approval be granted; and (d) "therefore, it was impossible for Trustco to obtain exchange control approval in order to make payment in compliance with the PTA Condition"; and (5) maintaining the sanction would therefore stifle an appeal for which permission has been granted. (The quoted wording comes from Trustco's skeleton argument).

31. Steps (1) to (3) of this argument are common ground, or sufficiently established by uncontradicted evidence. It is clear, also, that Trustco appointed an authorised dealer, Bank Windhoek. There is no suggestion that any steps have been taken by anyone to obtain recognition of the English judgments and orders from the Namibian courts. But every other element of Trustco's case is contentious.

32. The evidence adduced by Trustco has a number of shortcomings. One of these is that it includes only extracts, one might say snippets, from the regulatory Manual for Authorised Dealers ("Manual") that is said to be critical to Trustco's case. There is no satisfactory explanation for the decision to produce only extracts, and the explanation

we have been given of the parts that have been produced is neither authoritative nor persuasive. Another deficiency is that there is no direct evidence of what passed between Bank Windhoek and the Bank, which is clearly critical. The explanation for this omission (namely that Trustco has no access to those communications) is unsatisfactory, given that Bank Windhoek appear to have been acting as Trustco's agents. A third, unexplained gap in the evidence is the absence of any minute or detailed record of an apparently important three-way meeting between the authorised dealer, the Bank and Trustco that plainly did take place on 21 September 2021.

33. As to the evidence we do have, I accept the main planks of Helios' case. First, the evidence reveals that Trustco's approach to seeking approval was not only dilatory but worse: the way they went about it was positively obstructive. Having done nothing to seek approval before the 15 July hearing, Trustco still did not engage with any approval process until mid-August 2021. Thereafter, whilst ostensibly applying for approval, Trustco simultaneously raised a number of supposed obstacles in a way that was calculated (in the sense that it was likely) to ensure that approval was not granted. The stated purpose of Trustco's six-page letter to Bank Windhoek dated 12 August 2021 was to set out its "serious reservations and concerns relating to this application". As Ms Reffin submits, this was not advocating approval but suggesting that the application should be refused. This approach led the Bank to conclude that Trustco was not even making applications for approval. That is clear from Bank Windhoek's letter to Trustco dated 25 August 2021 which quotes the Bank's response:

> "since the applicant is applying to the Control and at the same time is advising the Control to decline the application, the purpose of the application has become unclear to us."

34. Further, Trustco presented information to Bank Windhoek, which it "urged" Bank Windhoek to pass on to the Bank, which tended to undermine its ostensible application and which it should have known to be false, misleading, or ill-founded. It was said that the judgment of Sir Michael Burton was not final, that Trustco had a viable counterclaim, and that satisfaction of the PTA Condition would lead to Helios being doubly secured. No mention was made of the undertaking given by Helios on 16 July 2021. It was also suggested that satisfaction of the PTA Condition might trigger money laundering sanctions. The stated basis for this was that Trustco had "reason to believe" that the ultimate beneficiary of the security and hence of any funds paid out of Namibia would be a US company called TriLinc Global Impact Fund LLC ("TriLinc"). We have not been presented with any acceptable reason to harbour suspicions of criminality in respect of TriLinc.

35. The uncontested evidence is that TriLinc is no more than an investor in the facility, in which it has held a 100% participation from before it was drawn down. TriLinc's involvement with Helios was noted on the Helios website before the draw down and is publicly recorded in TriLinc's filings with the US Securities and Exchange Commission. Further, in October 2018 there was a meeting between three representatives of TriLinc and Trustco's CEO Dr van Rooyen and four other Trustco representatives, at which TriLinc's investment in Helios' loan to Trustco was discussed at some length. It is a matter of concern therefore that passages in Fichardt 5 suggested that a basis for suspicion about TriLinc was provided by the fact that on 15 July 2021 Counsel for Helios told Males LJ that she needed instructions from TriLinc before confirming the undertaking he required. Fichardt 5 said, on information and belief, that

an email of 2020 had "led Trustco to suspect that TriLinc had some involvement with Helios", but what was said at the hearing led Trustco to "appreciate" for the first time that "TriLinc had acquired a direct or indirect interest in the [Namibian Mortgage] or the proceedings in England and/or Namibia". Ms Fichardt referred to "arrangements" that "were not previously known to Trustco" and to a "hitherto undisclosed interest" of TriLinc.

36. Quick 4 was critical of these passages, asserting that there was no proper basis for Trustco's alleged fears. In reply, Fichardt 6 said that "Trustco agrees and accepts that it has known that TriLinc was an investor" since 2017. She said it had not been her intention to suggest otherwise. Her account was that what Counsel said in court had led Trustco to query "whether TriLinc has acquired a direct or indirect interest in the judgment sum". The suggestion is that this, coupled with a refusal by Helios to give disclosure on the matter, justified suspicion. I recognise that in this context the bar for suspicion may be set relatively low. Nevertheless, this appears to me to be groundless speculation at best. For one thing, as Males LJ pointed out in argument, it is hard to see how a suggestion of money laundering would work, if TriLinc had itself provided the funds.

37. Ms Hopkins, on Trustco's behalf, has conceded some of these points. She accepts that not all of the documentation drafted by Trustco and its lawyers in Namibia can be justified. She acknowledges that it contained inaccuracies, and that the August letters could be read as asking Bank Windhoek to obtain approval and not to do so. She has four main responses. First, she points to evidence that applicants such as Trustco have duties of full and frank disclosure. The only evidence of this is hearsay from Trustco's in house lawyer. Secondly, whilst she does not assert that this duty was in fact discharged, Ms Hopkins does invite us to accept the evidence of Ms Fichardt, also on information and belief, that this was the reason why Trustco wrote as it did. As to that, I have my doubts. As I have indicated, I certainly do not accept that there was a proper basis for raising the spectre of money laundering. Thirdly, we are invited to take a benevolent view of the apparent conflict between Ms Fichardt's witness statements. I am prepared to do that, on the basis that she was acting on information provided by others. Fourthly, Ms Hopkins asks us to strip away this "noise and colour" and focus on what she says is the key point, namely that whatever criticisms might be made of Trustco's correspondence, the reality is that it could never have obtained approval without a Namibian court order. Skilful though this aspect of Ms Hopkins' argument was, I do not find it persuasive.

38. I accept the second and third main planks of Helios' argument. The evidence does not establish that recognition of any English judgment was essential to the grant of exchange control approval by the Bank. Nor is it shown that the absence of such recognition was the reason why approval was not obtained.

39. It is, as Ms Reffin points out, a striking fact that the proposition which is now central to Trustco's case has taken so long to emerge. The argument that registration of an English judgment is a precondition of Bank approval is conspicuous by its absence from Trustco's long letter to the court dated 28 October 2021. It is nowhere to be found in Trustco's application for permission to appeal dated 24 November 2021. Nor was this the argument advanced in Fichardt 5. That statement did mention an affidavit of Ms Shikongo (to which I shall come) which suggested that a foreign judgment needed to be recognised, but all that was said about that affidavit was that it "foreshadowed the

difficulties that any application for exchange control approval would face". The reference was left hanging; the statement nowhere asserted that this was the reason, or even a reason, why Trustco's applications had not succeeded. The focus of Fichardt 5 was elsewhere.

40. In my view, the underlying documents do not support a conclusion that the Bank will only grant exchange control approval if there is a Namibian judgment, or that an authorised dealer requires sight of such a judgment before it can recommend to the Bank that a payment be made. If this were so, one would expect to see it reflected in the contemporary correspondence. This certainly shows Trustco asserting to Bank Windhoek that on its own "interpretation" of the applicable regulations a Namibian court order was necessary. But there is nothing from Bank Windhoek to suggest that it endorsed or agreed with that interpretation. More importantly, there is nothing in the contemporary documents to indicate that the Bank took that view. Rather the contrary.

41. I have already quoted the Bank's response to Trustco's "application" of 12 August 2021. The correspondence discloses that the Bank's response to the further application that followed was to say that it was "unable to consider the application as submitted" because it required "the authorised dealer to state whether or not recommend the application and the reason for making or withholding their recommendation." These words were reported in direct quotation marks in a letter from Bank Windhoek to Trustco dated 21 September 2021, following the three-way meeting I have mentioned. That letter went on:

> "3. Evident from the above quoted feedback is that our office, as the Authorised Dealer, is required to furnish the Control with a recommendation on whether or not, in our view, your application for approval of the international payment, must be approved [by] Control.
>
> 4. … If the court order involved was issued outside Namibia, an Authorised Dealer is required to refer the application to the Control for consideration and sanctioning.
>
> 5. … This requires that we view documentary evidence to confirm the amount involved. If the documentary evidence provided supports the payment request made, we have no further cause [to] withhold our recommendation for the approval of the application for the international transfer to be made.
>
> 6. In view of the feedback received from the Control… a fresh application can be made to the Control setting out all the facts previously submitted and accompanied by our recommendation as set out above."

Bank Windhoek already had the documentary evidence of the English judgment and had already submitted it to Control. The clear impression I gain from this letter is that all that was lacking at this stage was a recommendation from Bank Windhoek, which it had no reason to withhold, and this had been made clear by the Bank at the three-way meeting.

42. Despite this, Trustco seeks to rely on references in the correspondence to paragraph B.21(G) of the Manual for Authorised Dealers, and the extracts from that Manual to which I have already referred. I do not consider that Trustco's case is made good by those extracts, stripped as they are of any context, and unsupported by anything from the Bank. Ms Reffin suggests a more persuasive interpretation. This is that, reading the extracts in the context of the correspondence, the exchange control scheme can be seen to have two limbs. Authorised Dealers have delegated authority to approve certain kinds of application, one of which is an application for payment pursuant to a Namibian judgment. Other applications, including applications such as this one, must be approved by Control, on the recommendation of an Authorised Dealer. In this latter context, there is no requirement for a domestic Namibian judgment.

43. That analysis seems to me more consistent with the language of the extracts from the Manual that we have been shown, and consistent with references in some of Trustco's own correspondence. I am not dissuaded from this view by the affidavit of Ms Shikongo. She does not refer to the Manual. She does cite a passage from a guideline which is in near-identical terms to paragraph B.21(G). This indicates that Authorised Dealers may approve remittances in respect of judgments granted by a court in Namibia. It does not purport to limit the powers of the Bank. Ms Shikongo cites no text relating to foreign judgments, and provides no documentary evidence that the Bank is precluded from giving exchange control approval for the provision of security in accordance with a foreign court order such as the July Order. Ms Reffin's analysis also makes sense when one considers that, as is common ground, Trustco required exchange control approval to enter into the facilities agreement in the first place, and sought and was granted that approval. It would be an odd regime that allowed a debtor to use domestic currency to perform its contractual obligations to a foreign creditor but placed obstacles in the way once those obligations merged in a judgment.

44. Having said this much I can deal shortly with Trustco's contention that the reason the exchange control approval process broke down here is that there was no Namibian court order. That proposition is not supported by the contemporary documents. The evidence contains nothing from the Bank or Bank Windhoek that endorses or lends support to the view that a Namibian court order was required. The documents indicate that the approval process failed for other reasons. What happened after Bank Windhoek's letter of 21 September 2021 is that Trustco demanded that Bank Windhoek indemnify it against any adverse consequences of pursuing the application. By letter to Trustco dated 8 October 2021, Bank Windhoek understandably declined, stating that it was acting on Trustco's instructions and "in view of the request by Trustco for indemnification" it could not proceed to make the application. (I note in passing that this letter provides further support for the above analysis of the exchange control regime: "the … Manual does not delegate authority to Authorised Dealers in the case of foreign judgments"). After this, Trustco made an approach to the Bank itself, but that was inevitably turned down given that applications had to be made via Authorised Dealers.

45. Trustco has failed to show that it was unable to satisfy the PTA Condition. The overall picture is that the exchange control approval process failed because Trustco first delayed, then failed to make any or any proper application. Instead, it threw obstacles in the way of an application or its approval. It brought about the withdrawal of its nominated authorised dealer, failed to appoint a substitute, and made an application itself which it should have known was bound to fail. Trustco has failed to show that the

absence of a Namibian court order recognising the English orders in this case had any causal role.

46. These conclusions inevitably carry weight when it comes to the third stage of the *Denton* analysis. At this stage, the question is whether in all the circumstances it would be just to allow Trustco to seek a variation of the July Order which would, in substance, amount to discharging the PTA Condition. There are two related issues. The first is the narrow question of whether it would be just to permit such an application at all. The bigger question concerns the merits of such an application. As Ms Hopkins accepted, relief from sanctions would be pointless unless Trustco would have at least a realistic prospect of obtaining a variation.

47. I bear in mind that a decision to refuse relief means that Trustco's appeal will not be heard, and the order of Sir Michael Burton can be enforced. But as Males LJ pointed out when giving judgment on 15 July 2021, the court has not found the hearing below was unfair; it has gone no further than to say that is arguable. Conditional permission to appeal on that ground was granted on the basis of a finding that there was a compelling need for security in this jurisdiction, and an express understanding that Trustco could provide it. Trustco has failed to show that it was unable to do so, so that enforcement of the PTA Condition amounts to stifling its appeal. Trustco's only alternative is to force Helios back on the Namibian Mortgage which the court has assessed as inadequate security.

48. The balance of prejudice was assessed in July 2021. Trustco then behaved unreasonably, in the ways I have outlined above. It allowed the unless order to come into effect without making any application. Its present application has been much delayed and comes on for hearing the month before the appeal is listed for hearing. It is not necessary to decide whether granting the application would imperil the hearing date, or impose other substantial uncompensatable harm to Helios, though that does appear to be a real possibility. Trustco has wholly failed to show that matters have changed since 15 July 2021 in such a way that it might be just to strike a different balance now.

49. That is the basis on which I would decide this application. But I add that I consider that we would have lacked jurisdiction to entertain the application to vary. As this is not a ground of decision, I shall state my reasons shortly.

The application to vary: jurisdiction

50. Trustco has already had two opportunities to contest in this Court the issue of what if any security it should provide: first at the original "paper" stage, when it was seeking permission to appeal; and secondly on its own application to vary, heard and determined by Males LJ on 15 July 2021. At the first stage, Trustco led Males LJ to believe that it could provide security in this jurisdiction. At the second stage, Trustco sought to persuade him that this was difficult, and should not be required. It lost that argument but gained a variation of the original order. Ms Reffin submits that, Trustco having attended the oral hearing, CPR 52.18(3) applies; Trustco's rights to seek a variation in this Court are exhausted; the remedy, if there were one, would be an appeal to the Supreme Court with the permission of this Court or the Supreme Court itself. This appears to be the view taken by Trustco at the time of its letter of 28 October 2021. Trustco now advances a different argument, but I think Ms Reffin is right.

51. It is true that the hearing on 15 July 2021 was not a hearing "at which permission was given". But Ms Hopkins' submission that this takes the case outside the scope of rule 52.18(3) is unduly literalist. As I see it, that rule is an expression of the fundamental principle of finality. Generally, it is not possible to challenge a final decision otherwise than by appeal. In interlocutory matters, there is a greater degree of flexibility. But it is not permissible endlessly to re-argue an interlocutory issue. The ostensibly broad power to revisit an order conferred by CPR 3.1(7) is normally exercisable only where the circumstances have materially changed, or in certain other limited kinds of case: *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591. Otherwise, an attempt to rake over an interlocutory matter will be regarded as an abuse of process: see *Thevarajah v Riordan* [2015] UKSC 78, [2016] 1 WLR 76, esp [24].

52. Rule 52.18(3) seems to me to narrow the scope for revisiting an interlocutory decision still further. On an ordinary reading, it appears to eliminate the scope for revisiting a condition on permission to appeal, once there has been a hearing of some kind. An interpretation of the rule that confined it to cases where permission was granted at an oral hearing would deprive it of most of its force, now that the norm is for such decisions to be made (as here) on paper, with a decision on any condition made at the same time. I would treat the words "hearing at which permission was given" as covering a hearing, such as the one that took place on 15 July 2021, where a decision is made as to the conditions to be imposed on permission. No subsequent application is allowed.

53. Trustco has sought to anticipate this problem by relying on the liberty to apply recorded in paragraph 7 of the July Order. Trustco treats this as allowing it to seek a variation in the event of a material change of circumstances. There are two reasons why I do not think this works. First, I think it turns on an over-broad interpretation of the July Order. Read in the context of Males LJ's judgment, and in particular paragraph [40] which I have quoted above, I think paragraph 7 has a much narrower ambit. It is essentially concerned with an application for an extension of time to comply. At best it might extend to the working out of the fine detail of matters such as the guarantee provided for by the PTA Condition as varied. (I should add that I have come to this view on the basis of the record, before and independently of any discussion of the issue with Males LJ himself). The second reason why I do not think Trustco can avail itself of the liberty to apply is that, for the reasons already given, Trustco has failed to demonstrate a material change of circumstances.

Permission to appeal

54. At the end of the hearing, we asked Ms Hopkins if Trustco was still maintaining its written application of 24 November 2021 for permission to challenge in the Supreme Court what Males LJ said on 29 October 2021. She formally invited us to grant permission. We refused that application.

LORD JUSTICE MALES:-

55. I agree.