Neutral Citation Number: **[2024] EWHC 2922 (Comm)**

Case No: CC-2023-BHM-000002

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KBD)

Birmingham Civil Justice Centre
Priory Courts, 33, Bull Street, Birmingham Royal B4 6DS

Date: 14 November 2024

Before :
HHJ WORSTER

- -

Between :

MA Fastmove Limited	**Claimant**
- and -	
(1) Global Billpay Private Limited	
(2) FMC Trading	**Defendants**
(3) Ali Salamat	

- -
- -

Tim Chelmick and **Kelly Yu** (instructed by **PCB Byrne LLP**) for the **Claimant**
The 1st Defendant did not appear and was not represented
Mizan Abdulrouf (o**f Five Pillars Law Limited**) for the **2nd Defendant**
Timothy Frith (instructed by **WYN Legal**) for the **3rd Defendant**

Hearing date: 14 October 2024

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Judgment Approved by the court for handing down (subject to editorial corrections)

This judgment was handed down remotely at 2 pm on Thursday, 14 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

HHJ WORSTER :

Introduction

1. This is an application by the Claimant ("Fastmove") for summary judgment against all three Defendants. The second and third Defendants ("FMC" and "Mr Salamat" respectively) appear by Counsel and solicitors, but the first Defendant ("Billpay") has not acknowledged service, and has taken no part in the proceedings so far. That is despite the fact that Mr Salamat was, until quite recently, the Director of Billpay, and still appears to be filing evidence on its behalf in proceedings brought by the Claimant against the first Defendant in Singapore.

2. The claim has been served on Billpay in accordance with an order for alternative service. No application has been made to set aside that order, and on the evidence before me I regard the claim and this application as having been properly served on Billpay. Solicitors for Mr Salamat have written to the Court objecting to aspects of the alternative service applied for and directed. However, that is not an application to set aside the order for alternative service, and unless and until Billpay make such an application, the Claimant is entitled to rely upon the order it obtained.

3. The application for summary judgment is unusual in that Fastmove would be entitled to take judgment in default. Billpay have not acknowledged service, and neither FMC nor Mr Salamat have filed a defence. The reason that it has elected to apply for an order which requires a consideration of the merits by the Court, is a concern that in some jurisdictions a default judgment may be regarded as an administrative act, rather than a judicial act, and that consequently there may be difficulties enforcing it. CPR Part 24 .4(1) provides that a claimant may not apply for summary judgment before a defendant has filed a defence. However, it may do so if the court gives permission. That requires there to be a good reason. Cogent concerns as to the international enforceability of a default judgment provide such a reason. There was no opposition to that application, and I grant permission.

4. In the days leading up to this application, Fastmove indicated that it would limit its application for summary judgment to the pleaded claims for breach of contract and breach of trust against Billpay and FMC, and its claims against Mr Salamat for procuring those breaches. In particular it decided that for the purposes of this application it would not pursue its claims for misrepresentation. That simplifies the issues for consideration.

5. The evidence in support of the application is set out in the two witness statements made by Fastmove's solicitor, and the three witness statements from its Director, Mr Safi. FMC rely upon the witness statement of Mr Jalaludeen (FMC is his trading name) and Mr Salamat relies upon his own witness statement. The bundle of documents is extensive, but the narrowing of the scope of the application means that I need not refer to many of those documents in this judgment. Where I do refer to documents I give the page number in the bundle in square brackets.

6. Finally I had skeleton arguments from Counsel for Fastmove, FMC and Mr Salamat and a combined bundle of authorities.

7. The approach to an application for summary judgment is set out in the well known judgment of Lewison J (as he was) in *Easyair Limited v Opal Telecom Limited* [2009]

EWHC 339 (Ch) at [15]. The parties all relied upon various aspects of that approach, and so I set out the paragraph in full.

> *As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
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> i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
>
> ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
>
> iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
>
> iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
>
> v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
>
> vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
>
> vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of*

success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

8. The Defendants rely upon the fact that caution is to be exercised before giving judgment, and the nature of the test at (i) (ii) (iii) (v) and (vi). The Claimant recognises the nature of the test, but draws attention to issues where the Defendants evidence is lacking in substance, and in relation to its claim for breach of contract, relies in particular upon (vii), asking the court to determine the issue of construction at this stage. Mr Chelmick also refers to the evidential burden on a Defendant to adduce evidence establishing a real prospect of success where the claimant adduces credible evidence in support of an application; see Henshaw J in *Lex Foundation v Citibank NA Limited* [2022] EWHC 1649 (Comm) at [34]-[35].

Background

9. Fastmove offers a range of financial services to its customers. One is the collection and conversion of cash. On the facts of this case, that involved the collection of sterling banknotes in the UK, their transport by air to Singapore, and their conversion into US dollars. The converted currency was then credited to an account operated by Billpay, and paid out to beneficiaries nominated by Fastmove.

10. The evidence before me is that Fastmove's business is regulated by the FCA, and Mr Chelmick took me to documents which showed that the export of the physical cash was passed through the appropriate customs procedures. Whilst FMC and Mr Salamat do not go so far as to say that this business is illegal, they both refer to the possibilities that this service provides for those who wish to launder money or breach sanctions, and to the sums of money involved. There is no evidence that this service is used to launder money or breach sanctions. Fastmove acknowledges that its customers include those who do not have UK bank accounts, and that in the 3 months or so during which the parties traded, some £35M in cash was collected and delivered to Singapore. I return to those suspicions when considering whether there is some other compelling reason for a trial per CPR Part 24.3(b).

11. The key document so far as the claims against Billpay and FMC are concerned, is the written agreement entered into by Fastmove, Billpay and FMC on 14 June 202. The parties have referred to this as the "Banknotes Agreement" [382]. It was signed by Mr Safi for Fastmove, Mr Salamat for Billpay, and Mr Jalaludeen for FMC. Given its importance, I set out the potentially relevant parts in full.

12. The agreement begins with the parties. Having identified Billpay, it identifies FMC and says this: .. *(FMC, together with BillPay, the Suppliers).* Fastmove is defined as the customer.

13. There is then an interpretation section, which includes the following:

The following definitions and rules of interpretation apply in these Conditions.

Definitions:

"Banknotes" means banknotes denominated in any relevant currency that may be purchased or sold by the Suppliers and the Customer under these Conditions and

the Contracts from time to time as detailed in each Order in the form as prescribed in Schedule 2 to these Conditions.

"Charges" means the charges due and payable by the Customer for the supply of the Services in accordance with Condition 6.

"Contract" means a contract concluded between the Customer and any or both of the Suppliers in respect of an Order for the supply of Services in accordance with Condition 2.2.

"Customer Account" has the meaning set out in Condition 5.3.

"Order" means the Customer's order for the supply of Services, as set out in the Customer's written acceptance of the Supplier's quotation or overleaf, as the case may be.

"Order Confirmation" means a written notice (in the form of an email or electronic memorandum) issued by the Customer to the Suppliers confirming details of the agreed transaction including but not limited to the volume of banknotes, settlement figure, currency, and settlement date.

"Services" means the services, to be provided by the Suppliers under the Contract, as set out in the Specification.

"Specification" means the description of the Services and any additional obligations in respect of the Services as listed in Schedule 1 to these Conditions.

14. Condition 2 is headed : BASIS OF CONTRACT:

2.1 An Order constitutes an offer by the Customer to purchase the Services from the Suppliers in accordance with these Conditions.

2.2 An Order shall be deemed to be accepted by the relevant Supplier(s) on the earlier of the date on which : 2.2.1 the Supplier issues the written acceptance of the Order; or 2.2.2 any act by the Supplier becomes consistent with fulfilling the Order, when the Contract shall come into existence (Commencement Date).

2.3 These Conditions apply to the Contracts to the exclusion of any other terms that the Suppliers seek to impose or incorporate, or which are implied by law, trade custom, practice or course of dealing.

15. Condition 3 is headed SUPPLY OF SERVICES

3.1 The Supplier(s) shall from the Commencement Date and for the duration of each Contract provide the Services to the Customer in accordance with the terms of that Contract.

3.2 ...

3.3 All instructions from the Customer to the Supplier(s) shall be complied with by the Suppliers within such time as may be advised by the Supplier(s) at the time of receipt of the instruction provided that such compliance is permissible by applicable laws.

3.4 In providing the Services, the Suppliers shall ... and a series of obligations are then set out.

16. Condition 4 is headed CUSTOMER REMEDIES

4.1 If the relevant Supplier fails to perform the Services by the applicable dates, the Customer shall, without limiting or affecting other rights or remedies available to it, be entitled to one or more of the following rights:

4.1.1 to terminate the Contract with immediate effect by giving written notice to the Supplier;

...

4.4 The Customer's rights and remedies under the Contracts are in addition to, and not exclusive of, any rights and remedies implied by statute and common law.

17. Condition 5 refers to the Customers obligations. Condition 6 is headed CHARGES AND PAYMENT and include the following:

6.1 The Charges for the Services shall be set out in each Order and shall be the full and exclusive remuneration of the Supplier(s) in respect of the performance of the Services under the Order. Unless otherwise agreed in writing by the Customer, the Charges shall include every cost and expense item of the Supplier(s) directly or indirectly incurred in connection with the performance of the Services.

18. Condition 7 deals with Intellectual Property Rights. Clause 8 is headed ASSUMPTION OF LIABILITY AND INDEMNITY and includes this:

8.1 The parties agree that BillPay shall, unconditionally and irrevocably, have sole responsibility for any or all liabilities owed to the Customer by itself and/or FMC arising out of or in connection with these Conditions and the Contracts. For the avoidance of doubt, BillPay's obligations to the Customer are primary and not secondary and the Customer shall have the right to enforce directly and immediately against BillPay for any or all liabilities owed to it by FMC.

8.2 BillPay shall indemnify the Customer against all liabilities, costs, expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other reasonable professional costs and expenses) suffered or incurred by the Customer arising out of or in connection with any claim brought against the Customer for ...

8.2.2 the supply and performance of the Services by BillPay and/or FMC.

8.3 The parties agree that this Condition 8 shall in no way whatsoever affect the Customer's rights and shall not operate as a waiver of any of the Customer's rights to enforce directly against FMC.

19. Condition 9 deals with Data Protection. Condition 10 deals with Insurance, the obligation being on Billpay to maintain indemnity insurance in relation to the Services. Condition 11 deals with Termination under the Contract and Condition 12 with the Consequences of Termination. Condition 13 is headed GENERAL, and includes the following:

13.5 Entire agreement. These Conditions and the Contracts constitute the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject

matter. In the event of any conflict or inconsistency between these Conditions and the Contracts, the terms of the Contracts shall prevail.

13.6 Variation. Except as set out in these Conditions, no variation of the Contracts, including the introduction of any additional terms and conditions, shall be effective unless it is agreed in writing and signed by the parties or their authorised representatives.

13.7 Waiver. A waiver of any right or remedy under these Conditions and/or the Contracts or by law is only effective if given in writing and shall not be deemed a waiver of any subsequent right or remedy. A failure or delay by a party to exercise any right or remedy provided under the Contracts or by law shall not constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict any further exercise of that or any other right or remedy. No single or partial exercise of any right or remedy provided under the Contracts or by law shall prevent or restrict the further exercise of that or any other right or remedy.

The governing law is that of England and Wales; see 13.10, and the courts of England and Wales have exclusive jurisdiction clause; see 13.11.

20. Finally, Schedule 1 provides for the SERVICE SPECIFICATION:

The Suppliers shall execute foreign exchange (fox) transaction at the applicable exchange rate. The Customer acknowledges that the relevant Supplier may provide a quote for the exchange rate upon considering various factors including the Supplier's reference market rate. The "applicable exchange rate" shall be a foreign exchange rate quoted by the Supplier after taking into account, inter-alia, reference market rate, risk factors, costs and spread, as may be reasonably determined by Supplier. The parties acknowledges that there could be variations between the Customer's assessment of the fox and the Supplier's quote. The Customer shall independently assess whether the exchange rates quoted by the Supplier are acceptable to the Customer, prior to agreeing any fox transaction with the Supplier.

In consideration for the Customer providing an agreed amount of Banknotes denominated in Pound Sterling (GBP) (GBP Banknotes) to the Supplier, the Supplier shall convert such an amount of GBP Banknotes into an amount of US Dollars (USD) (USD Amount) at an exchange rate agreed between the parties on the relevant date and time stipulated in the Order sent by Customer to Supplier and the Supplier shall credit such USD Amount to the Customer Account. The Supplier shall, provided there is sufficient funds standing to the Customer Account and upon instructions from the Customer, promptly make payments to the intended payees either by electronic wire transfer or in Banknotes denominated in the requisite currencies through the Supplier's local network partners located in the relevant jurisdictions. The parties agree to apportion responsibility for appointing a secure cash collection agent to collect Banknotes from the Performance Location (as specified in the Order Confirmation or the Order). In the event of a conflict between the Order Confirmation and the Order, the Order shall take precedence.

The party appointing the cash collection agent shall at its own expense, be responsible for putting in place formalities and documentation to comply with all applicable regulatory and legal requirements. The parties agree that collection

and delivery of Banknotes shall be governed by applicable legal and regulatory requirements for the secure collection of Banknotes. Risks associated with the collection and delivery of the Banknotes will pass to the Supplier upon delivery to the Performance Location by the cash collection agent. The Supplier shall be required to verify, count and confirm receipt of the Banknotes upon delivery. Verification and counting of the Banknotes shall be carried out in the presence of CCTV upon delivery.

21. Before considering the terms of the Banknotes Agreement, and the issues of interpretation which arise, Mr Chelmick took me to some of the documents to demonstrate how this worked in practice. It begins with Fastmove collecting the sterling in the UK. It is then flown to Singapore and delivered to FMC for counting and verification. That part of the process is reflected by three documents. First an invoice showing the transfer of the notes from Fastmove to FMC; see for example the invoice at [2110] which shows the transfer of some £982,000 from Fastmove to FMC. Second, an invoice from the couriers ; see for example the invoice at [2111] giving a customs value in US dollars. Third, an Airway Bill to FMC; see for example the bill at [2112].

22. Having counted and verified the notes, there is then a discussion about the foreign exchange rate. That was done by WhatsApp. The "chat" involved Mr Safi, Mr Salamat and Mr Jalaludeen. There is an example at [2573]. At 6.38 on 4 July 2022 the funds were received. At 9.47 the rate was agreed. On every transfer, there is this sort of negotiation about the rate.

23. Once the rate is agreed, the equivalent amount in US dollars is to be credited to an account held by Billpay. Fastmove then give Billpay instructions as to where that money is to be sent. FMC are not involved in that stage of the operation. The relevant "chat" involves Mr Safi and Mr Salamat; see for example at [2589].

24. Fastmove had understood that FMC would convert the cash from sterling into dollars and transfer it electronically into the relevant account. However, Mr Jalaluddeen's evidence is that he converted the sterling into Singapore dollars and then handed it to couriers nominated by Mr Salamat. His evidence is that he has no idea what happened to it then. Fastmove accept for the purposes of this application, that this is correct. FMC passed the money to Billpay.

25. Between 1 July 2022 and 20 September 2022, £35,038,920 was sent by Fastmove to FMC by 22 shipments. Based upon the agreed rates of exchange, that would be around $41,185,000. There is difference of $300 between the parties, which may reflect rounding. However, the total amount remitted to Fastmove by Billpay was some $39,500,000. There is a bigger difference between the parties as to the sums remitted by Billpay. Fastmove's calculation is $39,453,615. Mr Salamat's figure is $39,495,750. The Claimant sets out the list of payments remitted at [1746]-[1752]. By its calculation, the shortfall is £1,731,377. In addition, the sum of $248,326 was not successfully remitted to Fastmove's payees. The total is US$1,979,703.07. Mr Salamat does not provide details of his figure.

26. From September 2023, Mr Salamat (then the Director of Billpay) refused to execute any further remittance orders. He gave a number of reasons, none of which are now relied upon, and by an email on 5 October 2022 he suspended Fastmove's account with Billpay [1601], saying that this was "*... due to serious contractual, compliance and criminal breaches, full particulars of which are well known to you"*

27. Fastmove obtained a freezing injunction over Billpay and FMC's assets in Singapore. However, the Defendants to those proceedings disputed jurisdiction, and these proceedings were then begun. It took some time to effect service. This application was then made on 30 November 2023.

The claim against Billpay

28. Billpay has not filed any evidence in response to this application, but that does not automatically render it liable. The court is to consider the evidence before it from the Claimant and the other Defendants and apply the summary judgment test. The claims are for breach of contract and breach of trust. Mr Chelmick's submission is that as a matter of construction, the contractual duties on Billpay are clear, and a breach is established.

29. It is part of FMC's case that the Banknotes Agreement is derived from a template produced by Practical Law, and that clause 8 and Schedule 1 would have been where the parties actually focussed their minds and agreed special amendments to the template. I return to Mr Abdulrouf's submissions below, but having read this agreement, and heard the parties' submissions on the approach to the construction of it, I was satisfied that it was a coherent and well drafted document. The key to understanding the issues which Mr Abdulrouf highlighted in the context of the claim against FMC, is to begin with the definitions the agreement uses, and to understand the nature of the agreement being made.

30. The Banknotes agreement is in the nature of a framework for individual Contracts. Those Contracts are … *concluded between the Customer and* ***any or both*** *of the Suppliers in respect of an Order for the supply of Services in accordance with Condition 2.2.* (emphasis added). The fact that the Contract could be between either or both of the "Suppliers" (defined as Billpay and FMC) explains the deliberate use of the terms "Suppliers", "Supplier", "Supplier(s)" and "relevant Supplier". In other words, the framework is drafted so that it will cover a Contract entered into between Fastmove and one or both of Billpay and FMC.

31. Whilst it was FMC who received and counted the money, and passed it on to Billpay, the Orders which gives rise to the Contracts in this case were placed with both Billpay and FMC. They are the "relevant Supplier(s)" for the purposes of clause 2.2. The framework would also cover the situation where an order was placed only with FMC, or only with Billpay. The latter was something the parties might have contemplated. There is evidence to the effect that in time Billpay might have taken on the work FMC were carrying out as the cash collection agent. But at the material time it did not.

32. In consequence, as the Supplier, Billpay and FMC agree to provide the Services. The Services are set out in the Schedule. The Banknotes agreement draws no distinction between the roles of Billpay and FMC, nor between the counting, verification and exchange of the money on the one hand, and its payment into the designated account and remittance to Fastmove's customers on the other. It provides that the Supplier:

> *… shall convert such an amount of GBP Banknotes into an amount of US Dollars (USD) (USD Amount) at an exchange rate agreed between the parties on the relevant date and time stipulated in the Order sent by Customer to Supplier and the Supplier shall credit such USD Amount to the Customer Account. The Supplier shall, provided there is sufficient funds standing to the Customer Account and upon instructions from the Customer, promptly make payments to the*

intended payees either by electronic wire transfer or in Banknotes denominated in the requisite currencies through the Supplier's local network partners located in the relevant jurisdictions.

33. The fact that Billpay and FMC divided up those roles between them does not affect the obligation to Fastmove under the terms of the Banknotes agreement. The contractual obligation is indivisible.

34. One argument which might have arisen were Billpay represented, is that on one construction, the relevant Orders were placed with FMC alone. That would be a curious outcome, but even if there were anything in it, Billpay would still be liable under the terms of the Banknotes agreement. By clauses 8.1 and 8.2 Billpay accept responsibility for the liabilities of FMC, and provide an indemnity; see paragraph 18 above. FMC raise arguments about clause 8 to which I return, but I can see no argument which might establish a real prospect of defending a claim against Billpay.

35. Mr Salamat's evidence is that Billpay is entitled to offset certain fees and charges against its liability to Fastmove. He says that Billpay could set off other sums as set out in the Schedule at [2791]. Firstly there is a charge of a further 5% of the dollar equivalent of the monies shipped to Singapore. This is said to have been agreed orally between the parties. Secondly a float of 10% which would be forfeit if Fastmove failed exclusively to use Billpay and FMC's services in Singapore. Thirdly further money transfer fees, tracer fees and the cost of some hotel accommodation.

36. The difficulty with the allegations of a further 5% and the additional charges, is that they run directly contrary to the express terms of the Banknotes agreement. Clause 6 provides that the Charges set out in the Order comprise …*the full and exclusive remuneration of the Supplier(s) in respect of the performance of the Services ….* Clause 6 provides that anything different is to be agreed in writing. The Defendants do not produce anything in writing, nor do they allege that there is anything in writing. The Schedule also provides that in fixing the exchange rate, the Supplier make take into account … *inter-alia, reference market rate, risk factors, costs and spread, as may be reasonably determined by Supplier.* Mr Chelmick submits that this is where the Suppliers take their cut. Moreover, such an oral agreement would also be excluded by the operation of the entire agreement clause, and the clauses as to variation and/or waiver; see paragraph 19 above.

37. I also note that these allegations were not raised at the time the agreement was suspended, but appeared for the first time in the Singapore proceedings.

38. The "float" argument lacks reality. The Banknotes agreement does indeed require that there be a positive balance in the relevant account for the Supplier to effect a remittance to Fastmove's customer. That makes commercial sense. But what is alleged goes well beyond that. It fixes a 10% float, for which there is no obvious basis or rationale, but which for some reason must be maintained. Moreover the float is then forfeit, here because of an alleged breach of an exclusivity agreement. There is no apparent basis for any of that. The Banknotes agreement provides for exclusivity, but for the benefit of Fastmove, not Billpay or FMC. But even if there was some such obligation, that provides no basis for the forfeiture of the float. It was telling that in the submissions Mr Frith made on behalf of Mr Salamat he chose to rely on other points, and to avoid further consideration of this aspect of his clients case.

39. The second claim made against Billpay is for breach of trust. This is a separate cause of action, but derives from the obligations set out in the Banknotes agreement. Billpay and FMC were obliged by the terms of the Schedule to credit the "Customer Account", which was defined as "the Customer's account at the Suppliers". In a Safeguarding letter dated 1 July 2022 [401] Billpay acknowledged or declared that there was a trust of that money. The letter confirms that the funds will be kept separate, and that they were held "*in our capacity as trustee*". The use of clear and unconditional language by the trustee, identifying the subject matter of the trust, in circumstances where such an obligation would naturally arise, is sufficient to satisfy the summary judgment test. It follows that the Claimant is to have summary judgment against Billpay on the basis of both breach of contract and breach of trust.

The claim against FMC

40. In his evidence, Mr Jalaludeen suggested that there was no consideration for the Banknotes agreement. That was plainly incorrect. The second paragraph of the Schedule begins with the words *"In consideration …".* Mr Abdulrouf did not pursue the point in his skeleton argument, and made it clear that he did not pursue the point before me. His submissions focussed on two main points. The first relates to the construction of the obligation to remit the money. The second to the effect of clause 8.

41. Dealing firstly with FMC's obligations. The starting point for FMC's case is that the money went missing after it was handed over to Billpay, and that it is Billpay who are the "wrongdoer" here. On the evidence, that appears to be the case. Mr Chelmick did not submit to the contrary.

42. FMC's case is that it was the cash collector, and had no role to play in the remittance of the money to Fastrack's customers. In simple terms, that was something known and understood by the parties, and formed part of the factual matrix against which the terms of the Banknotes agreement were to be construed. As I understand the point, it is to the effect that FMC is not the "Supplier" for the purposes of the obligation to remit. Mr Abdulrouf submits that I should not perform an unduly literalist exercise, but have regard to business common sense. As to the law here, there was little between the parties. I was referred in particular to *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at [15], and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at [10].

43. Mr Abdulrouf develops the point in his skeleton argument at paragraphs 9-12, drawing attention to the definition of both Billpay and FMC as "Suppliers" and the subsequent use of both the singular and plural (and reference to relevant supplier). He also seeks to rely upon pre-contractual discussions in which Mr Jalaludeen made his limited role clear to Mr Salamat. There are two points as to those pre-contractual discussions. The first is that they were only between the Defendants. The second is that where there is a written contract which sets out the parties' obligations, the court is slow to take into account discussions like these. The court will have regard to the facts and circumstances known or assumed by the parties at the time the document was executed, but evidence of the subjective intention of the parties, or their understanding of what they were agreeing to, is not admissible in a case like this.

44. It is true that the Banknotes agreement uses Supplier in the singular and the plural. I have deliberately set out the terms where this is done. But on a proper reading, that is not poor drafting or a cause of ambiguity. It is a reflection of a framework which allows for Contracts to be entered into with either or both of the Suppliers. As Mr Chelmick

submits, when that is understood, the drafting makes sense, and the mechanics of the agreement work.

45. Mr Abdulrouf draws attention to the fact that the "customer account" in which the monies were held was in Billpay's sole name, to the terms of clause 5(3), and to the fact that FMC were not party to the Safeguarding letter of 1 July 2022. Whilst those matters reflect the fact that FMC took no part in the remittance of the money, they do not alter the analysis of the contractual obligation. I can well understand that if the question of construction begins with a division of roles (or a desire to read the agreement as contemplating such a division), then the use of the language might be seen as a reflection of what Mr Jalaludeen says he understood the agreement to mean. But when the language of the Schedule is tested against that construction, it becomes apparent that the agreement cannot mean what FMC want it to mean. Ther agreement provides for a joint obligation. To my mind the language is clear, and fits into the general scheme of the agreement.

46. The second, and related point, arises from the terms of clause 8.1. This begins by providing that the parties agree that Billpay shall *unconditionally and irrevocably have* ***sole*** *responsibility for any or all liabilities owed to the customer by itself and/or FMC* [emphasis added]. It then provides that Billpay's liabilities are "primary". Mr Jalauddin's evidence is that he thought that Billpay's liabilities were the primary ones, so that his liabilities were secondary.

47. Mr Abdulrouf's best point here is the use of the word "sole". But what are the consequences of his construction? It would be that there had been some form of waiver of Fastmove's rights as against FMC, or perhaps a requirement that they pursue Billpay first. The former cannot be right, because clause 8.3 says in terms that clause 8 does not operate as a waiver or limit Fastmove's rights. Mr Abdulrouf submits that clause 8.3 is a standard clause, and that it cannot stand with clause 8.1, which must have been negotiated and is the better guide to the intention of the parties. I do not agree. Clause 8.3 forms a coherent part of the scheme clause 8 is providing for – the additional liability of Billpay. It is natural to make express provision that this additional liability and indemnity does not affect Fastmove's rights against FMC. Requiring that Billpay be pursued first (which is my formulation rather than Mr Abdulrouf's) is unworkable and uncertain.

48. What makes sense of clause 8.1 is the notion that it provides an additional right for Fastmove. It is headed as an Indemnity, and whilst the word "sole" jars a little, the obvious intention is to make Billpay responsible for all liabilities, whether or not Billpay was party to or involved in a particular Contract. The reference to primary liability in this context, is to the primary liability of an indemnity, rather than the secondary liability of a guarantee. The intention is not to relieve FMC of its liability, but to provide an additional remedy against Billpay.

49. This is the sort of case where the court should grasp the nettle on the issue of construction. For the reasons set out above I prefer the Claimant's interpretation. There will be judgment against FMC on the breach of contract claim. As a joint obligor, FMC would have a claim as against Billpay. But that does not provide it with a defence to a claim by Fastmove.

50. The breach of trust claim against FMC is subtly different to the breach of trust claim against Billpay. Whilst the contractual obligations were joint, there may be something in the point that the account was in fact only in the name of Billpay, and there is some

evidence that the parties knew and understood that. That is reflected by the fact that the Safeguarding letter comes from Billpay, and is not signed by FMC. It did have control of the cash for a time, and passed it on to Billpay. It probably was a trustee of the money at that stage. The claim may not add much, and (given the many other issues) was not explored in great detail. Standing back, and given that any breach of trust appears to have occurred when the money was in Billpay's hands, I can see that there may be arguments here which give rise to a real prospect of success.

51. Finally, FMC contend that this is a case where there is some other compelling reason for a trial. The point is best encapsulated by Mr Abdulrouf at paragraph 34 of his skeleton argument, where he submits that

> "The service provided to customers by [Fastmove] is, in fact, so incredibly slow, costly and risky that one suspects it could only appear a rational service to one category of illicit customer"

He sets that against his submission that Mr Jalaluddin is an "honest actor".

52. There is no evidence of illegality or wrongdoing on the part of Fastmove. The business is regulated, and it is apparent that the export of the banknotes is through legitimate channels involving customs. This was a commercial arrangement from which FMC stood to gain. Mr Jalaludeen appears to have acted honestly; indeed it is Fastmove's case that it is Billpay who have withheld the money, not FMC. But whilst there might be sympathy for Mr Jalaludeen for the situation he finds himself in, his suspicions as to the legality of the business he was involved in do not amount to a compelling reason to require a trial of this matter. The dispute has been on foot in one form or another for two years or so. If there were evidence to support the suspicions FMC raise then it should have come to light by now.

The claim against Mr Salamat

53. Fastmove's case is that Mr Salamat was the controlling mind of Billpay at the material times. The claim against him is that he procured its breach of contract and breach of trust.

54. Paragraph 65 of the Particulars of Claim pleads out that claim:

> *65. Further, Mr Salamat committed the tort of inducing BillPay and/or FMC's breaches of contract and/or fiduciary duty and/or trust as set out above. In particular, Mr Salamat:*
>
> *65.1. Directed the activities of BillPay and/or FMC in connection with the Banknotes Agreement;*
>
> *65.2. Caused BillPay and/or FMC to act in breach of their obligations in connection with the Banknotes Agreement, as set out in paragraphs 63 and 64 above;*
>
> *65.3. Knew that the matters set out in paragraph 63 and 64 above amounted to breaches of the Banknotes Agreement and/or breaches of BillPay and/or FMC's fiduciary duties to the Claimant and/or breaches of trust;*
>
> *65.4. In the circumstances, it is reasonably to be inferred that Mr Salamat therefore intended, by his direction, for BillPay and/or FMC to act in*

breach of contract, breach of fiduciary duty and/or breach of trust, and thereby to cause economic loss to the Claimant.

55. That formulation of the case is repeated in the witness statement made by the Claimant's solicitor in support of this application.

> *57. Given his knowledge of the Banknotes Agreement, his issuing of the Safeguarding Letter and his many communications with Mr Safi, it is clear that Mr Salamat knew that these actions amounted to breaches of the Banknotes Agreement and / or breaches of BillPay and / or FMC's fiduciary duties to the Claimant and /or breaches of trust.*

The matters in paragraph 63 and 64 include the failure of Billpay to remit the balance of the monies due.

56. The legal position was largely agreed as between Mr Chelmick and Mr Frith. The starting point is the decision in *Said v Butt* [1922] 3KB 497; to the effect that a company Director who is acting bona fide in his role as a Director is not personally liable for procuring the company's breach of obligation. To hold otherwise would drive a coach and horses through the principle of limited liability.

57. I was also referred to the decision of Mrs Justice Gloster in *Crystalens v White* [2006] EWHC 3357 (Comm), where the exceptions to that rule are considered.

> *[10] In reliance upon the case of Said v Butt ... Mr Sterling submitted that in circumstances where an employee or director is acting bona fide and with his authority, he cannot be liable for procuring a breach of contract made between his company and a third party. He submitted that there is no authority to the contrary effect. He argued that the sentence in the current edition of Clarke and Lindsell, at paragraph 25-44 to the effect that, "If a director has ordered or procured the breach by the company, he may be liable in tort, given that he possesses the requisite knowledge and intention" is a wrong statement of the law, and that the authorities upon which it purports to rely are not in fact in point, and do not support the proposition in the text. It was accepted by Miss Troy-Davis that as presently drafted, the Particulars of Claim do not allege that the second defendant, Dr White, was acting otherwise than within his authority as a director of C.R.L. and bona fide. What Miss Troy-Davis submitted however, was that the proposition in Clarke and Lindsell, to which I have referred, is sufficient authority to allow this claim to proceed*
>
> *[11] In my judgment, the law on this is clear and there is nothing in the proposition in Clarke and Lindsell that detracts from the general rule that, in circumstances where a director is acting bona fide and within the ambit of his authority, he has no personal liability for procuring his company to commit a breach of contract*
>
> *[15] In my judgment, it would be contrary to the principle of limited liability if, in the circumstances postulated in Said v Butt, namely that an employee director is acting within his authority and bona fide in the interests of his company, could be liable in such circumstances for inducing a breach of contract on the part of the company in circumstances absent, additional features, such as conspiracy or dishonest*

58. The exception here would be dishonesty, and Mr Frith relies in particular upon the last sentence of the judgment in *Crystalens* at [15]. His submission is that Fastmove have

not pleaded the necessary additional feature of dishonesty, and that it is not for his client to have to respond to such a serious allegation without the case having been properly pleaded against him. Mr Frith submitted that the lack of the pleading of dishonesty against Mr Salamat was also apparent from paragraph 11 of the Particulars of Claim, which provides as follows:

> *The Claimant expressly reserves the right, upon further information becoming known and/or available for use in this litigation to add claims, including claims alleging dishonesty by the Defendants, as to their state of knowledge when they made false representations and/or as to the apparent disappearance of the Claimant's money.*

59. Moreover he submitted that it was a necessary part of the pleading of an economic tort to set out particulars of the mental element alleged – here the lack of bona fides leading to personal liability. I invited Mr Frith to indicate what Mr Salamat's defence to an allegation of dishonesty would be. He told me that instructions would need to be taken once the matter had been properly alleged. He acknowledged that I would not find that to be a helpful response.

60. Mr Chelmick submits that dishonesty is pleaded, but if necessary that he would amend the claim to do so. He also referred to the judgment Lane J in *Antuzis and others v D J Houghton Catching Services Ltd* [2019] EWHC 843 (QB), in which the court considered the scope of the principle in *Said v Butt*:

> *[62] ... the Said v Butt principle should be interpreted to exempt directors from personal liability for the contractual breaches of their company (whether through the tort of inducement of breach of contract or unlawful means conspiracy) if their acts, in their capacity as directors, are not in themselves in breach of any fiduciary or other personal legal duties owed to the company.*

61. Later in the judgment he considered the nature of the duties a director owed to the company, in particular those imposed by section 172 and 174 of the Companies Act, and the circumstances in which the breach of such a duty would render a director personally liable for inducing the company to breach its contract with a third party.

> *[118] ... section 172 of the Companies Act imposes important duties on directors to act in good faith so as to promote the success of the company and, in so doing, to have regard to matters such as "the likely consequences of any decision in the long term: the interests of the company's employees; the impact of the company's operations on the community; and the desirability of the company maintaining a reputation for high standards of business conduct". Section 174 of the same Act imposes a duty on the directive to exercise reasonable care, skill and diligence.*
>
> *[119] The nature of the breach of contract is directly relevant to the determination of whether, in a particular case, a director has complied with section 172, as regards his or her duty to the company and the ultimate question whether inducing the breach is actionable against the director.*
>
> *[120] There is, plainly, a world of difference between, on the one hand, a director consciously and deliberately causing a company to breach its contract with a supplier, by not paying the supplier on time because, unusually, the company has encountered cash flow difficulties, and, on the other hand, a director of a restaurant company who decides the company should supply customers of the*

chain with burgers made of horse meat instead of beef, on the basis that horse meat is cheaper. In the second example, the resulting scandal, when the director's actions come to light, would be, at the very least, likely to inflict severe reputational damage on the company, from which it might take years to recover, if it recovered at all.

62. In *Antuzis*, the court held on an application for summary judgment that the inescapable conclusion was that the directors knew that they were completely unable as a matter of law to act as they did on behalf of the company, and were personally liable; see at [126]. Mr Chelmick submits that in causing Billpay to fail to remit monies to Fastmove, he has so obviously breached his duties to Billpay that I should find that he falls into the exception to the rule in *Said v Butt*. In the language of *Antuzis* this is, he submits, a "horsemeat case".

63. Mr Frith's position is that I should not consider granting summary judgment against Mr Salamat because the case against him has not been pleaded. I agree with Mr Frith that the word "dishonesty" is not used in the pleadings to describe Mr Salamat's conduct. Nor is there an allegation that he has acted in breach of the duties he owed to Billpay as its director. What is positively alleged is that Mr Salamat knew that what he directed Billpay to do amounted to a breach of Billpay's obligations to Fastmove. In other words that Mr Salamat knew that Billpay was not entitled to act as it did. If you know something is wrong, you have no honest belief that it is right. Inevitably that means you are not acting bona fide and/or in accordance with the duties of a director.

64. The court adopts a cautious approach to the grant of summary judgment in cases of fraud and the like, although it will do so where the facts justify it. Cockerill J outlined the approach in her judgment in *King v Stiefel* [2021] EWHC 2045 (Comm) at [25]:

> *In terms of the approach to summary judgment in fraud claims Primekings commended to my attention the judgment of Stuart Smith J in Portland Stone Firms Ltd v Barclays Bank plc [2018] EWHC 2341 (QB) at [25] – [29], in the context of the approach to be taken when faced with an application to strike out a claim in fraud. In summary:*
>
> *i) The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court's conventional perception that it is generally not likely that people will engage in such conduct.*
>
> *ii) Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.*
>
> *iii) However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a "generous" approach to pleadings.*

65. The factual position Mr Chelmick presents is a powerful one. On the face of it there is no justifiable reason for withholding the $1.9M, and the reasons subsequently given by Billpay and by Mr Salamat in his witness statement are either contrary to the terms of

the Banknotes agreement, or unreal. The reliance on the absence of a pleading of dishonesty smacks of a technicality.

66. That said, the Claimant has not expressly pleaded why Mr is Salamat is personally liable. The court should exercise caution before making a finding of dishonesty or conduct akin to it. Rather than determine the application at this stage, I adjourn it with permission to restore. Fastmove has permission to amend its claim to particularise its case as to Mr Salamat's personal liability, including his lack of bona fides and/or breach of his duties to the company, in the next 28 days. Any further evidence in support of this application is to be filed and served at the same time. Mr Salamat is then to file and serve a Defence and, if he so chooses, any supplemental evidence in response to this application within 28 days of the service of the amendment. The application may then be restored. That course gives Mr Salamat the opportunity to provide his instructions to his lawyers and to give such evidence as he may to establish that he has a defence with a real prospect of success, before a decision is made.

67. The argument that Mr Salamat's claim for harassment provides some other compelling reason for a trial is without merit. No such claim has been brought despite the time which has elapsed since the events relied upon.

68. Finally it was said that a finding of a lack of bona fides at this stage would deprive Mr Salamat of the opportunity to deal with the issue at trial of the other claims, where it might effect the outcome of the misrepresentation/negligent misstatement claims. I see no merit in that point. The basis of the finding at summary judgment would be on the basis that there was no real prospect of establishing a defence. If there were any merit in that argument, it falls away with the further opportunity given to Mr Salamat to provide details of his defence.

67. I have handed down judgment without the attendance of the parties because of difficulties of availability. The parties are attempting to agree a minute of order, and I adjourn the hearing of this matter to a date to be fixed.