EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0029

BETWEEN:

[1] EMMERSON INTERNATIONAL CORPORATION

Appellant

and

[1] RENOVA INDUSTRIES LTD
[2] LAMESA HOLDING SA
[3] VIKTOR VEKSELBERG
[4] INTEGRATED ENERGY SYSTEMS LIMITED
[5] ODVIN FINANCIAL INC
[6] FLOPSY OVERSEAS LIMITED

Respondents

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:

Mr. Pushpinder Saini, QC with him Mr. Robert Weekes and
Mr. Grant Carroll for the Appellant
Mr. Ali Malek, QC with him Mr. Simon Birt, QC and Ms. Arabella di Iorio
for the Respondents

2016: October 19, 20;
2017: March 23.

Commercial appeal – Application for Summary judgment on certain issues – Whether learned judge erred in dismissing appellant's summary judgment application

The appellant and the group of companies who are parties to the claim, collectively referred to as Abyzov, and the respondents, Renova, engaged in discussions with a view to Abyzov investing in Renova's business. Abyzov contended that those discussions resulted in a legally binding oral agreement (the "2006 oral agreement"). Abyzov

thereafter made significant financial contribution to the business. After discussions in October 2011, the parties executed a document relating to the business venture which they referred to as the Principal Terms. In June 2013, the appellant sought to exercise a put option in accordance with the Principal Terms.

The respondents responded by filing a claim in which they sought inter alia declaratory relief that the exercise of the put option was ineffective. The appellant filed a defence, a counterclaim, and an ancillary claim. The appellant subsequently filed an application for summary judgment. The application was based on the following grounds: (i) the parties to the Principal Terms did not intend to be bound by them; and (ii) the Principal Terms are an agreement to agree and therefore not binding and enforceable. The learned judge dismissed the application on the basis that Renova has a realistic prospect of establishing that the parties did intend to create a contractual commitment and a realistic prospect that the Principal Terms were certain enough to sustain a contractual commitment.

Abyzov appealed the decision in relation to the issue of whether the Principal Terms were binding and alleged that the learned judge erred in his application of rule 15.2 of the Civil Procedure Rules 2000 ("CPR"), failed to rule on the issues in dispute and when he did so he gave no reasons for his decision. Abyzov also contended that the learned judge erred in his analysis of various clauses of the Principal Terms in arriving at his decision to dismiss the application.

Held: dismissing the appeal with costs to the respondents to be assessed within 21 days if not agreed, that:

1. In deciding whether to exercise powers of summary disposal, the court must have regard to the overriding objective. The court should always consider whether the objective of dealing with cases justly is better served by summary disposal of the particular issue or by letting all matters go to trial so that they can be fully investigated and a properly informed decision reached. In this case, this is the approach that the learned judge adopted in determining the application. He acknowledged that summary judgment could be granted on a single issue, but, having considered the pleadings and the various submissions, found that Renova had a real prospect of success on the issues on which summary judgment was sought. As such, the learned judge did not err in his application of CPR 15.2.

   James Phillip Wragg et al v Partco Group Limited et al [2002] 2 Lloyd's Rep 343 applied.

2. It is settled law that a court does not have to rule on every submission that is made by counsel. However, a judge is required to deal with those issues which are vital to the determination of the matter and give reasons for his decision. The learned judge identified the main issues, stated the principles of law and the reasons why he reached his conclusion throughout the judgment. The learned judge also identified those matters which he did not consider were critical to his determination

of the application such as the changing position of both parties in relation to the Principal Terms. In this regard, this Court is of the view that both sides could understand why the learned judge reached his conclusion.

Peter Andrew English v Emery Reimbold & Strick Limited [2002] EWCA Civ 605 applied.

3. The court in determining whether specific sub-clauses were uncertain must construe them in the context of the entirety of the Principal Terms. The Principal Terms do not deal simply with the transfer of shares in Renova's business to Abyzov. They also contain detailed provisions to govern the relationship between Renova and Abyzov, a detailed dispute resolution mechanism including the option to buy-out, along with other provisions. There are factual issues that require a trial. Accordingly, this was not an appropriate case for the engagement of the summary judgment procedure. There would have been no saving of costs nor the resources of the court since the court would still have to determine the issues in relation to the counterclaim and ancillary claim and the issue of whether the parties intended to create legal relations. The learned judge was correct in resisting the siren call to bring the proceedings or a significant part of them to an early end before a full trial.

Allied Fort Insurance Services Limited et al v Munawar Ahmed et al. [2015] EWCA Civ 841 applied; **Hallman Holding Ltd v Webster and another** [2016] UKPC 3 distinguished.

REASONS FOR DECISION

[1] **THOM JA**: This is an appeal against the decision of the learned judge in which he dismissed the appellant's application for summary judgment on certain issues. At the end of the hearing we dismissed the appeal and indicated that we would give our reasons subsequently. We do so now.

[2] The background facts to this appeal are that the respondents ("Renova") have substantial assets in the energy sector in Russia. These assets were held by a group of companies collectively referred to as Integrated Energy Systems ("IES"). Around 2006 representatives of a group of companies of which the appellant is associated (for ease of reference, the appellant and the group of companies who are parties to the claim are collectively referred to as "Abyzov") and Renova

engaged in discussions with a view to Abyzov investing in Renova's business. Abyzov contended that those discussions resulted in a legally binding oral agreement (the "2006 oral agreement"). Abyzov thereafter made significant financial contribution to the business. By 2011, Abyzov had contributed US$475,339,291. After discussions in October 2011, the parties executed a document relating to the business venture which they referred to as the Principal Terms. In June 2013, the appellant sought to exercise a put option in accordance with the Principal Terms. The respondents responded by filing a claim in which they sought inter alia, declaratory relief that the exercise of the put option was ineffective. The appellant filed a defence, counterclaim and an ancillary claim. The appellant subsequently filed an application for summary judgment. The application was based on the following grounds: (i) the parties to the Principal Terms did not intend to be bound by them; and (ii) the Principal Terms are an agreement to agree and therefore not binding and enforceable.

[3] The learned judge in dismissing the application concluded:

> "I have paid little attention to the changing positions of the parties since the signing of the Principal Terms. Rather, I have looked at the Principal Terms and asked myself whether, objectively, there is evidence of an intention to create a contractual commitment and whether that document is too uncertain to create such a commitment. It is plain to me that the Renova Group has a realistic prospect of establishing that the parties did intend to create such a commitment and a realistic prospect that that document is certain enough to sustain a contractual commitment. On that basis I dismiss the application for summary judgment and the consequential application to strike out the claim".[1]

[4] Abyzov appealed the decision in relation to the issue of whether the Principal Terms were binding. They are content to have the issue whether the parties intended to create legal relations be determined at trial.

[5] While the notice of appeal contains several grounds of appeal, Mr. Saini, QC very helpfully placed them into two broad groups: (i) Errors of approach/misdirection –

[1] At para. 58.

grounds A, B, and D; and (ii) Errors of analysis of the Principal Terms – grounds C, E, F, G, and H. At the hearing, Abyzov did not pursue their submission in relation to ground D where they had contended that the learned judge had misdirected himself when he took irrelevant matters into account. In our view, this was the correct approach since there was no merit in the submissions.

Errors of Approach

[6] Abyzov's complaint under this heading is two-fold, firstly they complain that the learned judge erred in his application of rule 15.2 of the **Civil Procedure Rules 2000** ("CPR"), and secondly he failed to rule on the issues in dispute and when he did so he gave no reasons for his decision.

CPR 15.2

[7] Mr. Saini, QC submitted that the learned judge approached the application on the basis that summary judgment would not be appropriate where all of the issues between the parties would not be resolved. He referred to paragraphs 1 and 9 of the judgment.[2] Mr. Saini, QC contended that this approach was erroneous as CPR 15.2 provides for summary judgment to be granted on any issue of fact or law. Further, this case was an appropriate case for the grant of summary judgment since the issue whether the Principal Terms were binding and enforceable was a matter of construction of the Principal Terms and as such no disclosure or evidence was necessary. He relied on the case of **B J Aviation Limited v Pool Aviation Limited**.[3] He further submitted that determination of the issue would significantly affect the remaining issues to be determined at the trial since Renova's main contention is that the Principal Terms are binding and

[2] At para. 1: "This is one of those applications that will not, if successful, dispose of the proceedings because, even if successful, it will leave to be decided at trial all the issues the subject of the Counterclaim and Ancillary Claim. It is regrettably, another example of an inappropriate use of the summary judgment procedure."

[3] [2002] EWCA Civ 163.

therefore, they are not liable to Abyzov in contract, restitution or pursuant to any trust.

[8] Mr. Malek, QC submitted in response that the learned judge's approach to the application was correct. CPR 15.2 gives the court a discretion whether to grant summary judgment. The court could only grant summary judgment if it is satisfied that a party has no real prospect of success, in this case, on the issue. Further, there would be no cost saving as the same material would have to be considered in relation to the issue of whether there was intention to create legal relations and it would not bring an end to the proceedings. Mr. Malek, QC relied on this Court's decision in the case of **Comodo Holdings Limited v Renaissance Ventures Limited**[4] and the cases of **JD Wetherspoon Plc v Harris**,[5] **Three Rivers District Council v Governor and Company of The Bank of England**,[6] **James Phillip Wragg et al v Partco Group Limited et al**,[7] and **Allied Fort Insurance Services Limited et al v Munawar Ahmed et al**.[8]

[9] It is well established that the provisions of CPR 15.2 permit the court to grant summary judgment on a single issue even though that would not bring an end to the proceedings. On a careful reading of the paragraphs referred to by Mr. Saini, QC, it is clear that the learned judge did not approach the matter in the manner as contended by Mr. Saini, QC. The paragraphs must be read in context. The learned judge having dismissed the application at the end of the hearing, at the very inception of his written reasons, expressed the view that this was not an appropriate case for summary judgment on a single issue.

[10] In the case of **James Phillip Wragg et al v Partco Group Limited et al** Potter LJ summarised the approach that a court should adopt when considering an

[4] BVIHCMAP2014/0032, (delivered 3rd May 2016, unreported).
[5] [2013] 1 WLR 3296.
[6] [2003] 2 AC 1, para. 95.
[7] [2002] 2 Lloyd's Rep 343.
[8] [2015] EWCA Civ 841 at paras. 100-101.

application for summary judgment on a single issue, where, if summary judgment is granted, there would still be a trial of the remaining issues as follows:

> "(1) The purpose of resolving issues on a summary basis and at an early stage is to save time and costs and courts are encouraged to consider an issue or issues at an early stage which will either resolve or help to resolve the litigation as an important aspect of active case management … .This is particularly so where a decision will put an end to an action. (2) In deciding whether to exercise powers of summary disposal, the court must have regard to the overriding objective. (3) The court should be slow to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event and/or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action. (4) The court should always consider whether the objective of dealing with cases justly is better served by summary disposal of the particular issue or by letting all matters go to trial so that they can be fully investigated and a properly informed decision reached. … (5) Summary disposal will frequently be inappropriate in complex cases. If an application involves prolonged serious argument, the court should, as a rule, decline to proceed to the argument unless it harbours doubt about the soundness of the statement of case and is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of the trial itself… . (6) It is inappropriate to deal with cases at an interim stage where there are issues of fact involved, unless the court is satisfied that all the relevant facts can be identified and clearly established… . (7) It is inappropriate to strike-out a claim in an area of developing jurisprudence. In such areas, decisions should be based upon actual findings of fact."[9]

[12] In our view, when the judgment is read in its entirety, this is the very approach that the learned judge adopted in determining the application. He acknowledged that summary judgment could be granted on a single issue, but, having considered the pleadings and the various submissions, found that Renova had a real prospect of success on the issues on which summary judgment was sought. He was also of the view that the overriding objective of dealing with matters justly would be best served if all of the matters are dealt with at trial where they could be fully investigated and an informed decision reached.

[9] At paras. 27 – 28.

Failure To Give Reasons

[13] Mr. Saini, QC identified several issues on which he contends that the learned judge failed to make a determination and or give reasons why he rejected Abyzov's contention that the Principal Terms do not constitute a binding agreement. This, he argued, was contrary to the well-established principle that a judgment must clearly indicate why the judge has reached that decision. These issues are:

(a) Whether paragraph 4.3(ii) of the Principal Terms which provide for guarantees to be given constituted an unenforceable agreement to agree;

(b) Whether the agreement to provide guarantees was a condition precedent to a number of agreements to be completed simultaneously;

(c) Whether the provisions in paragraph 4.2(ii) concerning the assumption to pay a debt of approximately US$166.9 million were uncertain on account of the obligor not being identified in the Principal Terms and there being no means to identify it;

(d) Whether the provision in paragraph 4.2(iii) for the making of a shareholder's agreement with a person that was not a party to the Principal Terms was uncertain;

(e) Whether paragraphs 4.2(iii) and 5.18 which require an "associated agreement" to be agreed with an unidentified corporate services provider constituted an unenforceable agreement to agree;

(f) Whether paragraph 10(a) of Schedule 2 was an unenforceable agreement to agree and was uncertain.

Mr. Saini, QC argued that if the learned judge had ruled on any one of the abovementioned issues in favour of the appellant then the learned judge would have been required to grant summary judgment.

[14] Mr. Malek, QC in response submitted that the learned judge was not required to rule on every issue, and the adequacy of the reasoning of the learned judge must be considered in the context of whether the losing party is unable to understand why the judge reached the conclusions he made. He relied on the cases of **Harris v CDMR Purfleet Ltd (Formerly Purfleet Thames Terminal Ltd)**,[10] and **Peter Andrew English et al v Emery Reimbold & Strick Limited et al**.[11] He acknowledged that the learned judge had not addressed the issue relating to clause 5.18 of the Principal Terms as identified by Abyzov, but submitted that this clause was not referred to in their application or the supporting evidence and was therefore not a 'core' point in the determination of the application. In any event the judgment made it very clear why the application was dismissed as the position was summarised in paragraphs 52 and 58 of the judgment.

[15] We agree with the submissions of Mr. Malek, QC. It is settled law that a court does not have to rule on every submission that is made by counsel. However, a judge is required to deal with those issues which are vital to the determination of the matter and give reasons for his decision. In **Peter Andrew English et al v Emery Reimbold & Strick Limited et al** on which both counsel relied, the court approved the following statement of this principle by Griffiths LJ in **Eagil Trust Co Ltd v Pigott-Brown and another**:[12]

> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case.

[10] [2009] EWCA Civ 1645.
[11] [2002] EWCA Civ 605.
[12] [1985] 3 All ER 119.

It is sufficient if what he says show the parties and, if need be, the Court of Appeal the basis on which he has acted …"[13]

And at paragraph 19:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for the process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in [sic] may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

[16] Having reviewed the judgment, we are of the opinion that the learned judge identified the main issues, stated the principles of law and the reasons why he reached his conclusion throughout the judgment.[14] An example is paragraph 52, where in dealing with the issue of uncertainty of the Principal Terms, in rejecting the submissions of Abyzov, the learned judge stated:

> "I hope I have done justice to Mr. Atherton's detailed and sustained arguments on uncertainty. I have dealt with the main points he made in this respect and many of the less important ones, though not all. However, I have considered all the points he made and he failed to persuade me that the principal Terms are too uncertain to amount to a binding commitment. The submissions on behalf of the Renova Group have persuaded me that they have a realistic prospect of succeeding at trial, which is the well-known test enunciated by Lord Woolf MR in **Swain v Hillman** [6]*[[2001] 1 All ER 91]*.

[17] The learned judge also identified those matters which he did not consider were critical to his determination of the application such as the changing position of both parties in relation to the Principal Terms.[15] When the judgment is considered in its

[13] At p. 122.
[14] Paras. 32, 37,42, 45, 52, 55, and 56.
[15] Paras. 28, 56, and 58.

entirety we are of the view that both sides could understand why the learned judge reached his conclusion.

Errors of Analysis

[18] Abyzov contended that the learned judge erred in his analysis of various clauses of the Principal Terms in arriving at his decision to dismiss the application. They argued that the Principal Terms were non-binding as some of the clauses such as those relating to the holding company for the IES assets, the shareholders agreement and associated agreements, the provision of guarantees, representations and warranties, and the transfer of "Agency Investments" were uncertain; they amounted to agreements to agree and/or were conditions precedent. I will summarise briefly the submissions made by the parties.

The Holding Company (Starlex)

[19] In relation to the holding company (the Starlex point) of the assets, the subject matter of the Principal Terms, were owned by IES while others were managed by IES. IES is defined in clause 1 of the Principal Terms as follows:

> "IES" – Integrated Energy Systems Limited, established in Belize, or any other company, registered outside the jurisdiction of the Russian Federation, consolidating the majority of the assets of KES, that agreed[3] [*Translator Comment: The Russian original translates as "agreed" only. Subject to the context of the document, this could be changed to "as agreed"*] by the Parties for the purposes of the Transaction."

[20] Mr. Saini, QC submitted that the fact that the holding company of the assets, the subject matter of the Principal Terms, had not been named in the Principal Terms showed that the agreement was uncertain. It could lead to a situation where the parties could be allotted shares in a company that did not own the assets. The Principal Terms therefore could not achieve their commercial purpose. This was an essential provision. The learned judge's finding that the issue could be resolved by the Abyzov Parties suing for breach of the Principal Terms was

fanciful as there is no term under which they could sue and the learned judge did not identify any in the judgment.

[21] Mr. Malek, QC submitted in response that the fact that the shares were held by Starlex at the time of the signing of the Principal Terms did not mean it could not achieve its commercial purpose. The Abyzov Parties were aware of and accepted that the assets were transferred to Starlex before the Principal Terms were signed. He also argued that the fact that provision was made for agreement to substitute another company to hold the shares did not make the Principal Terms uncertain. The learned judge was correct to find that Abyzov's remedy was in seeking to enforce the Principal Terms. He identified clauses 4.2(i) and 4.2(iv) as provisions under which such remedy could be sought.

Guarantees

[22] Clause 4.3(ii)[16] and paragraph (10)a of Schedule 2[17] make provision for the parties to agree guarantees to protect the interest of Abyzov in the KES[18] assets which were not owned by IES but which were to be transferred to IES by Renova. Mr. Saini, QC argued that this was an essential term because if the guarantees were not agreed then the appellant would be at risk of having shares in a company that did not have all of the assets bearing in mind the value of the KES assets was substantial. While the term was essential, the provisions were uncertain because (i) both the terms of the guarantee and the guarantors were not identified; (ii) the guarantees were to be reasonably acceptable but there was no mechanism in the

[16] Renova shall provide to the MA Group's representative a proposal for guarantees, reasonably acceptable for the MA Group, for the protection of the MA Group's interests in respect of those assets that are not owned by IES or its subsidiary companies, but are managed by IES, and the MA Group's representative, in turn, will review this proposal (acting reasonably) and the Parties will agree upon such guarantees.

[17] The Shareholders' Agreement shall provide for a warrant by [company] of Renova being a party to the Shareholders' Agreement that (a) the assets not owned by IES or its subsidiary companies, but which are under the effective management of IES, and regarded for the purposes of the Shareholders' Agreement to be assets of IES, will be put under the ownership of KES within a set term, which shall be agreed by the Parties in the Shareholders' Agreement, taking into account, among other things, the requirement to avoid negative material consequences for KES as a result of receipt of ownership of such assets;…"

[18] Collectively, IES and all subsidiary companies and assets directly or indirectly owned by IES.

Principal Terms by which the court could determine what was a reasonably acceptable guarantee. He relied on the case **The Scottish Coal Company Limited v Danish Forestry Company Limited**.[19]

[23] Mr. Malek, QC in response submitted that the provisions imposed an obligation on the Renova Parties to provide guarantees which were reasonably acceptable to the Abyzov Parties. A court would be able to interpret and determine whether the proposed guarantees were reasonably acceptable. The court would strive to uphold the bargain of the parties rather than adopt an approach to upset the bargain reached by the parties.

Representations and Warranties

[24] Schedule 2 paragraph 1 makes provision for representations and warranties to be made. The provision does not specify the terms of the representations and warranties but rather provided that they were to be discussed "in good faith". Mr. Saini, QC submitted that this paragraph was uncertain and unenforceable. There was no mechanism to deal with the situation where the parties cannot agree.

[25] Mr. Malek, QC in response submitted that the provision was enforceable as it provided for representations and warranties to be given. If there was no agreement on the terms then the issue was one of breach.

Shareholders and Associated Shareholders and Associated Agreements

[26] In relation to clauses 4.2(iii) and 5.18 which provided for the execution of a shareholders agreement and associated agreements such as nominee directors' services agreement, Mr. Saini, QC submitted these were agreements to agree and were uncertain for the following reasons: (i) Mr. M. Yu. Slobodin ("Mr. Slobodin") or his company who is to be a shareholder and therefore a party to the shareholders

[19] [2009] CSOH 171.

agreement is not a party to the Principal Terms. This uncertainty cannot be remedied by the court implying an obligation on the Renova Parties to secure the consent of Mr. Slobodin; (ii) the content of the shareholders agreement was not determined, only some of the terms were identified in paragraph 5; (iii) the provisions had the effect of the term "subject to contract" – this was an essential term but yet the contents were to be agreed; (iv) there were conditions precedent to be satisfied such as the agreement of guarantees before the shareholders agreement concluded; (v) representations and warranties are to be given when the shareholders agreement is made.

[27] Mr. Malek, QC submitted in response that there was an obligation on the parties to conclude the shareholders agreement. Renova had an obligation to ensure that Mr. Slobodin or his company agree the shareholders agreement. Similarly in relation to IES, the parties had an obligation to ensure the claims in Schedule 1 were converted to shares in IES, while clause 4.2(iv) sets out what would happen. It was therefore for the parties to implement the provisions. There was no evidence which showed any unwillingness on the part of IES not to issue shares to the parties as envisaged in the Principal Terms, further this would be implied in the Principal Terms. The chapeau to clause 5 does not have the effect of the phrase "Subject to Contract" rather it simply provides for the parties to agree further provisions for the shareholders agreement. In relation to clause 5.18, he submitted that it was merely an obligation on the parties to enter into such an agreement, however, even if the clause was unenforceable it would not render the entire Principal Terms unenforceable. He relied on the case of **Proton Energy Group SA v Orlon Lietuva**,[20] where email correspondence from the claimant to the defendant stated in paragraph 4 "Contractual price is fixed as per the confirmed offer. All other contractual terms not indicated into the offer shall be discussed and mutually agreed between parties upon contract negotiations". The defendant replied "Confirmed". The court found that although the parties agreed

[20] [2014] 1 Lloyd's Rep 100.

to agree other terms, the language of the provisions signified a commitment to be bound; the contract was therefore binding.

Agency Investments

[28] In relation to the Agency Investments, paragraph 4.3(i) makes provision for the transfer of "Agency Investments" which were investments of the Renova Parties in the shares of two Russian companies referred to as OGK-1 and TGK-7. Mr. Saini, QC contended that the provision is uncertain because it did not specify the number of shares in each company to be transferred but rather a total amount to be contributed in US currency. This made it necessary for some criteria to be in place to select the relevant shares to be transferred. The learned judge erred when he found that the due diligence provisions in the Principal Terms were sufficient criteria to identify the investments. The learned judge also erred when he found that the Renova shares in IES could have been reduced to resolve the matter as the provision was a condition precedent to the transaction. In the absence of the transfer of the shares, the commercial bargain between the parties would be different as Abyzov would not have an interest in the assets in OGK-1. Further, there was no contractual mechanism in the Principal Terms to make such an adjustment.

[29] Mr. Malek, QC in response submitted that the criteria in Schedule 1 was clear and the process would be subject to the due diligence process outlined in paragraph 2.2 of the Principal Terms and even if the provision was uncertain it would not render the Principal Terms unenforceable, rather the shareholding of the parties would have to be recalculated and this would not render the bargain radically different since the Agency Investment accounted for only 10% of the total contribution.

Discussion

[30] It was common ground between the parties that the law in relation to uncertainty is as outlined in **Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD**[21] and summarised by Chadwick LJ in **BJ Aviation Limited v Pool Aviation Limited**[22] as follows:

> "First, each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against the background of other facts, are not determinative and may not be of any real assistance. Second, if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future – on the basis that either will remain free to agree or disagree about that matter – there is no bargain which the courts can enforce. Third, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them – see Walford v Miles [1992] A.C. 128 at page 138G. Fourth, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a "fair" price, or a "market" price, or a "reasonable" price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. … But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness. Fifth, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court

[21] [2001] EWCA CIV 406.
[22] [2002] 2 P & CR 25.

> will provide its own machinery for determining what needs to be determined – where appropriate by ordering an inquiry (see Sudbrook Trading Estate Ltd v Eggleton [1983] AC 444).[23]"

[31] While Abyzov's complaints focused on specific sub-clauses, the Court in determining whether they were uncertain must construe them in the context of the entirety of the Principal Terms. Having reviewed the judgment and the Principal Terms, we found no error in the judge's analysis of the provisions and his finding that Renova's case had a real prospect of success. We were also persuaded by the submissions of Mr Malek, QC that Renova has a real prospect of success on the issue.

[32] In our view, this was not an appropriate case for the engagement of the summary judgment procedure. There would have been no saving of costs nor the resources of the court since the court would still have to determine the issues in relation to the counterclaim and ancillary claim and the issue of whether the parties intended to create legal relations. Obviously, if the court determines that there was no such intention there would be no need to consider if the Principal Terms are binding. There is no reason to hold separate hearings for the two issues. The overriding objective of dealing with cases justly would be better served if they are dealt with together. Further, authorities such as **Pagnan SpA v Feed Products Ltd**,[24] **Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD**,[25] **and RTS Flexible Systems Limited v Molkerei Alois Müller Gmbh & Company KG (UK Production)**,[26] show that where there is an intention to create legal relations, the court would seek to give effect to the bargain struck by the parties. The learned authors of **Chitty on Contracts**[27] put it this way:

> "Because the courts are "reluctant to hold void for uncertainty any provision that was intended to have legal effect", they may sometimes give effect to an agreement which provides for further terms "to be

[23] At p. 374.
[24] [1987] 2 Lloyd's Rep 615.
[25] [2001] EWCA CIV 406.
[26] [2010] UKSC 14.
[27] Sweet & Maxwell Ltd, 32nd edn.

> agreed". …this is not to say that the courts will hold parties bound when they have not yet reached substantial agreement, but once they have reached such agreement it is not fatal that some points (even important ones) remain to be settled by further negotiation."[28]

[33] The Principal Terms do not deal simply with the transfer of shares in Renova's business to Abyzov, but they also contain detailed provisions to govern the relationship between Renova and Abyzov, a due diligence procedure to verify the contributions made by the parties, the transfer of various share holdings and claims to IES, detailed provisions to be contained in the shareholders agreement and the associated agreements such as agreement for corporate services, various representations and warranties, pre-emptive rights of the parties, and a detailed dispute resolution mechanism including the option to buy-out, along with other provisions. This case is quite unlike the situation envisaged in **Hallman Holding Ltd v Webster and another**[29] where the Privy Council emphasised the need for courts to use the summary judgment procedure to dispose of short points of law or construction of simple contracts where there are not factual issues that require a trial. This is the type of case in our view where the learned judge correctly, in the words of Etherton C in **Allied Fort Insurance Services Limited v Munawar Ahmed et al**, "resisted the siren call to bring the proceedings or a significant part of them to an early end before a full trial".[30] The learned judge was correct in dismissing the summary judgment application and holding that it was right for the issue of the validity of the Principal Terms to be determined at a trial along with the other issues that were integrally related.

Procedural Issue

[34] At the commencement of the hearing Mr. Saini, QC urged the Court to sanction Renova for its lengthy written submissions of fifty-one pages in breach of the Practice Directions, by striking out the submissions, or alternatively by disallowing

[28] Paras. 2-135 – 2-136.
[29] [2016] UKPC 3.
[30] Para. 79.

them their costs on the appeal if they are successful. He relied on the case of **Robert Tchenguiz v Director of The Serious Fraud Office et al**[31] where the English Court of Appeal denied the appellant the cost of his skeleton arguments and the use of part of his supplementary skeleton argument which was 37 pages long, he already having filed initial skeleton arguments which were 47 pages long, both being in breach of the UK Practice Directions which stipulate that the submissions should not exceed 25 pages.

[35] Mr. Malek, QC in response urged the Court to consider, having regard to the nature of the appeal, whether the submissions although lengthy were helpful in resolution of the matter. If they were helpful, then Renova should not be denied their costs. Pursuant to paragraph 2 of Practice Direction 62D[32] disallowing costs would be the ultimate sanction.

[36] The rules governing skeleton arguments for use in the Court of Appeal are set out in Practice Direction 62D. The relevant provision is contained in paragraph 1.6 which provides that normally skeleton arguments should not exceed 10 pages in the case of an appeal on a point of law, which was the situation in this appeal, and in the case of interlocutory appeals, which this appeal is, parties should be able to do justice to the relevant points in considerably less than 10 pages. It is of no moment that this is an appeal from the Commercial Division. The Practice Direction applies to all appeals. The purpose of the skeleton argument is to assist the Court to deal with appeals in an efficient manner. It is therefore imperative that attorneys comply with the Direction.

[37] Paragraph 2 provides the consequences for non-compliance. A legal practitioner who is in breach of the Direction must give a good and sufficient explanation for his/her default. A failure to do so may result in the party being penalised in costs.

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[31] [2014] EWCA Civ 1333.
[32] No. 10 of 2011.

[38] There was substantial non-compliance by Mr. Malek, QC. However, we took into account that although this was an interlocutory appeal, it related to the construction of Principal Terms which, as explained earlier, were not a simple agreement for the transfer of shares. We also found that the submissions while lengthy were not prolix and were helpful in enabling the Court to dispose of the appeal at the end of the hearing which lasted two days. We are therefore of the view that Renova should not be penalised in costs.

[39] For these reasons we dismissed the appeal with costs to the respondents. The costs to be assessed within 21 days if not agreed.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar