Neutral Citation Number: [2017] EWCA Civ 2215

Case No: A3/2017/0657

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE ARNOLD
HC09C01992

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2017

Before:

LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NEWEY

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Between:

HRH PRINCE ABDUL AZIZ BIN FAHD BIN ABDUL AZIZ	**Appellant**
- and –	
JANAN GEORGE HARB	**Respondent**

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Ian Mill QC and Shaheed Fatima QC (instructed by **Howard Kennedy**) for the **Appellant**
Romie Tager QC and Ian Clarke QC (instructed by **Hughmans Solicitors**) for the **Respondent**

Hearing date: 13 December 2017

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Judgment Approved

Lord Justice David Richards:

1. The defendant in these proceedings (the Prince) appeals against the dismissal of his application for an order that, unless the claimant (Mrs Harb) paid an outstanding costs order of £250,000 by a specified date, her claim be struck out or stayed. Arnold J gave permission to appeal on two grounds but refused permission on a further ground. The Prince's application to this court for permission to appeal on the further ground, together with the appeal if permission were granted, was ordered to be heard together with the substantive appeal on the other grounds.

2. For the purposes of this appeal, the background facts can be shortly stated. Mrs Harb issued these proceedings in 2009, claiming that the Prince was obliged under the terms of an oral contract to procure the transfer to her of two apartments in Chelsea, London SW3 (the properties) and to pay her the sum of £12 million.

3. After some substantial interlocutory applications, including an unsuccessful application by the Prince to strike out the claim on grounds of state immunity (see [2015] EWCA Civ 481; [2016] Ch 308), the trial of the action took place before Peter Smith J in July 2015. He gave judgment on 3 November 2015, ordering the Prince to pay £15.45 million (including interest) to Mrs Harb and granting specific performance of the agreement to procure the transfer of the properties.

4. The Prince appealed to this court and by an order dated 16 June 2016 (the CA order) the appeal was allowed, on the grounds of deficiencies in the judgment. The case was remitted to the High Court for a re-trial.

5. The CA order also provided for Mrs Harb to pay 75% of the costs of the appeal, to be assessed on the standard basis if not agreed, and to pay £250,000 on account of those costs within 28 days. This order was stayed pending any application to the Supreme Court for permission to appeal. Mrs Harb's application to the Supreme Court was dismissed on 21 December 2016. The sum of £250,000 therefore became payable either immediately or after 28 days. Mrs Harb has not paid any part of it.

6. The CA order also required Mrs Harb to apply within 28 days to the Chancery Division for directions for the re-trial. This, too, was stayed pending any application to the Supreme Court. On 11 January 2017, Mrs Harb issued an application for directions, which was listed for a one hour hearing before a Master on 6 February 2017.

7. On 30 January 2017, the Prince issued the application which is the subject of this appeal. It was listed to be heard with the application for directions. The Master adjourned it to be heard by a Judge. Arnold J heard it on 6 February and gave judgment on 21 February 2017.

8. The Prince's application was supported by a witness statement made by his solicitor, Steven Morris, on 30 January 2017. Mr Morris noted that Mrs Harb had not applied for an extension of time to pay the interim costs and that there was no evidence before the court regarding her means or explaining her non-compliance. (This was not surprising, given that the Prince had only on that day issued his application.) Mr Morris continued: "…she has provided no evidence as to her financial position, e.g. whether and what she can afford to pay; how she has funded or intends to fund this

litigation; how she intends to meet any future adverse costs orders." Mrs Harb's solicitors had, however, emailed the Prince's solicitors on 20 January 2017 to say that she had no assets, other than her claim against the Prince, and was unable to pay the interim costs of £250,000. As I will explain in more detail later, the Prince had known that this was the position taken by Mrs Harb since June 2016, from a skeleton argument submitted to this court on her behalf.

9. Mrs Harb made a witness statement on 1 February 2017. She said, as is the case, that she had been made bankrupt on 1 May 2008. She said that she had no assets other than her claim against the Prince and "a right to receive 30% of the net profits of a film based on my book Royal Flush: The Saudi King and I, or my life story, pursuant to an agreement dated 19 February 2015 that has been disclosed to the Defendant". Under that agreement, she went on, she had received an up-front payment of £170,000 "which has all been spent on legal costs, dentist fees and general living expenses". The film had not yet been made and there was no immediate expectation of further payments under the agreement. The flat in which she lived belonged to her daughter. Her only income was her state pension. No family members were able or willing to lend funds to her. Her solicitors and counsel acted at the trial "on a basis that there was no immediate obligation to make payment and are continuing to act on that basis now". Her solicitors and counsel extended credit to her for their fees in respect of the appeal to this court and the application to the Supreme Court. She was unable to pay the costs ordered by this court and, if the order sought by the Prince were made, it would stifle her claim.

10. By a letter dated 2 February 2017, the Prince's solicitors acknowledged receipt of Mrs Harb's witness statement and sought certain information. They said that the information about the funding of her legal costs was unclear and they requested disclosure of all relevant agreements. They also sought clarification as to the use and availability of the sum of £170,000 received under the agreement dated 19 February 2015.

11. Mrs Harb made a further witness statement on 6 February 2017. She said that she had spent the sum of £170,000 as follows: £50,000 paid to her lawyers for their costs of the state immunity appeal; £39,000 for dental work; £24,000 paid to her daughter in respect of arrears of rent; £24,000 paid to her daughter for rent at £1,000 per month since 2015; £20,000 for renovation of the flat where she lives; £10,000 for her daughter's dental work; £4,000 in payment of a debt due to her son-in-law; £3,500 for work on the boiler and other specified plumbing and electricity work; and £1,200 for replacing asbestos with wood panels in the heating room. As to her legal costs, her lawyers acted at the trial under a conditional fee agreement. They acted on an ordinary fee-paying basis in this court and the Supreme Court but they had not rendered fee notes and to that extent they had extended credit to her and continued to do so.

12. Further statements as to Mrs Harb's financial position were made at the hearing by her counsel, on instructions. Her book had sold only a few copies, and Mrs Harb had therefore received no income from that source. She was unable to borrow any funds from third parties, as well as being unable to do so from members of her family.

13. I shall refer to the relevant parts of the judgment of Arnold J, when dealing with the Prince's grounds of appeal.

14. Mrs Harb opposed the Prince's application on the grounds, putting it shortly, that she was unable to pay the interim costs of £250,000 and that therefore the order sought by the Prince would stifle her claim.

15. As for domestic law on this issue, both parties were content to refer only to the recent decision of the Supreme Court in *Goldtrail Travel Ltd v Onur Air Tasimacilik AS* [2017] UKSC 57; [2017] 1 WLR 3014, decided after Arnold J gave judgment in the present case. The headnote accurately summarises the points relevant to this appeal:

> "*held:* that a condition on the grant of permission to appeal which would probably have the effect of stifling an appeal, in the sense of preventing the appellant from bringing or continuing it, should not be imposed; that, where a company which appeared to have no realisable assets of its own with which to satisfy an award of damages against it claimed that the imposition of such a condition would have that effect but the respondent alleged that the company had access to the resources of others, the court had to determine whether the company had established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy such a condition; that such test fell to be applied without examination of whether the circumstances were "exceptional" and required the taking of proper account of the parties' distinct legal personalities; but that the court ought not to take at face value any refutation by the company that the necessary funds would be made available to it, but rather was to judge the probable availability of the funds by reference to the underlying realities of the company's financial position, looking at all aspects of its relationship with its owner including the extent to which he had previously been, and was currently, directing its affairs and providing financial support."

16. I would accept the propositions derived by Mr Mill QC for the Prince from *Goldtrail*, and not disputed by Mr Tager QC for Mrs Harb. First, the burden of showing that the order sought by the Prince would stifle her claim lay on Mrs Harb. Secondly, the relevant standard was the balance of probabilities. Thirdly, the court should look at the underlying realities and should not simply take evidence at face value. Although the second and third points were in that case directed to the availability of outside finance to a company that did not itself possess the required means, they are in a general sense applicable to assessing the position of any party. I would only add at this stage that the court is constrained to decide an application on the evidence that the parties present to it, a feature of some importance in the present case, as will be seen.

17. The first ground of appeal, for which permission was given by Arnold J, was that he erred in concluding that it was not incumbent on Mrs Harb, being in breach of the CA order, to apply to the Court of Appeal for an extension of time or relief from sanctions. The CA order contained no sanctions and Mr Mill indicated at the start of the hearing that this ground was, rightly in my view, not pursued.

18. The second ground, for which permission had not been given, was that the judge erred in finding that Mrs Harb's evidence established that she was unable to pay £250,000 from her own resources and that she was unable to borrow the necessary funds from family members or other sources.

19. Arnold J dealt with Mrs Harb's evidence in his judgment at [15] – [18]. He recorded that the onus of establishing inability to pay the interim costs lay on Mrs Harb, which was not disputed by her, and has not been disputed before us. At [15] the judge summarised the evidence in her witness statements and at [16] recorded information provided at the hearing by her counsel on instructions. He stated his conclusion at [18] "that, if an order of the kind sought by the Prince is made, Mrs Harb will be unable to comply with it, with the result that her claim will either be struck out or stayed indefinitely".

20. On this appeal, Mr Mill criticises the judge's analysis and findings on the grounds that he made no reference to a number of matters which, Mr Mill submits, should have been taken into account. The failure to do so means that the judge's findings cannot stand and this court should look at the issue afresh and reach its own conclusions.

21. The omitted matters on which Mr Mill relies are as follows. First, there was no reference to the quality of Mrs Harb's evidence at the original trial, as found by the Court of Appeal. In the course of the submissions before the judge, Mr Clarke QC, on behalf of the Prince, referred to paragraphs 32 and 33 of this court's judgment. At [32], the court listed nine examples of what counsel for the Prince had submitted was Mrs Harb's "evasiveness or lack of credibility". At [33], the court said: "It is clear from these parts of her evidence, as well as from other passages in the transcripts to which it is unnecessary to refer in detail, that Mrs Harb's general reliability as a witness was open to serious question". It was submitted for the Prince that, in the light of these and other criticisms of her evidence, Peter Smith J should not have accepted her evidence of the critical oral agreement. As to that, this court said: "In a case where so much turned on the evidence of the witnesses, the judge should have dealt with this aspect of the matter in some detail". In the following paragraphs, this court identified a "number of significant respects" in which the judge's approach to the evidence had been "unsatisfactory".

22. Mr Mill referred us to other passages in the judgment to similar effect. Arnold J was not taken to them, and we need refer only to this court's conclusion on the findings of the trial judge: "This was not an easy case to try, given that the principal witness on one side [the Prince] declined to attend for cross-examination and the principal witness on the other gave evidence that was far from satisfactory and inconsistent with many of the important documents in the case. We are not able to go so far as to hold that the judge's findings of fact were contrary to the evidence, but we do consider that he failed to examine the evidence and the arguments with the care that the parties were entitled to expect and which a proper resolution of the issues demanded."

23. Secondly, Arnold J made no reference to Mrs Harb's failure to address in her evidence the question of earnings from her book, leaving aside the payment to her of £170,000.

24. Thirdly, the judge did not refer to Mrs Harb's failure to produce bank statements or other documents that could establish (or undermine) her statements of a lack of means.

25. Fourthly, there was no reference to the inconsistent evidence in her two witness statements about her legal costs.

26. Fifthly, there was no reference to her failure to address in her evidence the question whether she could raise funds from third parties. The judge was wrong to conclude that no third party was willing to lend funds to her, particularly bearing in mind that the onus of proof lay on her.

27. Sixthly, there was no reference to, or consideration of, the fact that Mrs Harb's daughter Rania had lent her £495,000 in 2003 and that she owned a flat in Chelsea (in the same apartment block as the properties) that Mrs Harb had given her in 1994-95 and in which Mrs Harb lived. There was no evidence as to Rania's means or willingness to lend the necessary funds to Mrs Harb.

28. Before considering these criticisms, it is appropriate to draw attention to other relevant features, First, and above all, there was before the court no evidence that Mrs Harb had assets or income other than as disclosed by her. The Prince adduced no evidence to counter or undermine the evidence given by Mrs Harb in her witness statements. Nor did the Prince adduce any evidence to suggest that she could raise the necessary funds from family members or third parties. The absence of any such evidence was a factor of considerable significance, given in particular that there was nothing intrinsically improbable about her evidence.

29. Secondly, Mrs Harb was made bankrupt in 2008, with debts, including substantial gambling debts, totalling over £1.5 million. Her assets at the time of her bankruptcy would have fallen into her bankruptcy estate. There was no evidence that she had acquired any significant assets since then, apart from the sum of £170,000. Nor was there any evidence to suggest that she concealed assets from her trustee or that she was uncooperative with her trustee.

30. Thirdly, the evidence provided by Mrs Harb in her witness statements had to be prepared very quickly. The Prince's application was issued on Monday 30 January 2017 for a hearing a week later. Mrs Harb's first statement was signed two days later. The Prince's solicitors raised specific queries in their letter dated 2 February, to which Mrs Harb replied in her second statement signed on 6 February 2017, the day of the hearing. Mr Mill submitted that Mrs Harb could have sought an adjournment to file fuller evidence, but in the absence of substantial evidence from the Prince that would be a surprising course. Mr Mill criticised the judge for accepting statements made on instructions at the hearing, but in a hearing brought on at short notice that is commonplace. The statements were made in response to particular points made by counsel for the Prince at the hearing. If they had been made in his solicitors' letter dated 2 February 2017, they could have been dealt by Mrs Harb in her second statement.

31. I turn therefore to the particular criticisms made by Mr Mill.

32. The first concerns the views expressed by this court about the quality of Mrs Harb's evidence at the original trial. In his judgment at [23], Arnold J stated: "Although the Court of Appeal noted that there were various problems with the evidence Mrs Harb gave before Peter Smith J, it did not conclude that these meant that she could not succeed in her claim". The judge was clearly alive to the adverse comments on her evidence at the trial, and it is idle to suppose that he was not aware of them when considering her evidence on this application, dealt with a mere five paragraphs earlier.

33. In the absence of any evidence undermining Mrs Harb's evidence and in the absence of intrinsic improbability in her evidence, it is difficult to see what the judge could have made of the Court of Appeal's observations. They suggest that her evidence should be approached with some caution but not that it should necessarily be rejected. There needed to be objections of substance to her evidence before it could properly be rejected. The absence of express reference to this point in the paragraphs of Arnold J's judgment dealing with her evidence is neither surprising nor suggestive that he did not have it in mind. As has been said many times, a judge is not required to spell out every point.

34. The judge's conclusion that Mrs Harb could not borrow the necessary funds from a third party is criticised, as is the lack of any reference to her failure to address this in her witness statements. Mr Mill points to the fact that Mrs Harb was lent very substantial sums by private non-family lenders in 2000 (£500,000) and 2005 (£215,000). These liabilities were unpaid at the time of Mrs Harb's bankruptcy and there is no evidence as to how much, if any, of these loans were repaid in the course of the bankruptcy. The fact of these loans provides no reason to suppose that in 2017 either of those lenders or any other non-family member would be willing to lend funds to Mrs Harb. Unless there is reason to suppose that she has significant assets or a substantial income, it would seem highly improbable that any third-party lender would advance £250,000 or any sum approaching that amount.

35. Likewise, it is submitted that the judge should have taken account of the loan of £495,000 made by Rania to her mother in 2003, which again had not been repaid by the time of the bankruptcy. Combined with her ownership of the flat where Mrs Harb lived, there was a sufficient possibility that Rania might advance the necessary funds to require further evidence from Mrs Harb and evidence from Rania, and for the judge to take account of the lack of any evidence that Rania would be unable or unwilling to lend those funds (beyond the simple statement that "[n]one of my family are willing or able to lend me any money").

36. This again appears to me to be an attempt to make bricks without straw. The fact that 14 years ago Rania made a loan of £495,000, which has not been repaid, provides no basis for thinking that she might be able or willing to lend £250,000 to her mother now. The Prince had no evidence to suggest that Rania had the funds to make such a loan or the ability to raise the required funds by borrowing. As to the latter, Mr Mill suggested that she could use the flat occupied by Mrs Harb as security for a loan, but there is no evidence before the court of Rania's tenure of the flat or of its value. In any event, there is no evidence of the means available to Rania to service or repay a loan. The unchallenged evidence provided by Mrs Harb as to how she spent the sum of £170,000 suggests that Rania is not a wealthy woman: £10,000 was spent on dental fees for Rania and £20,000 on renovation of the flat.

37. As to the remaining matters on which Mr Mill relied, there is, in my judgment, nothing in them. On instructions, Mrs Harb's counsel informed the judge that the book had not sold well and had not earned any (or any significant) royalties for Mrs Harb. There are no grounds for not accepting this, and it is not therefore surprising that it did not merit a mention in Mrs Harb's statements. The inconsistency between the statements as to the description of the arrangements for Mrs Harb's legal costs was minor, if indeed there was any. Further, the statements were no doubt drafted by her lawyers, who she could expect to be accurate on a matter directly involving them. With more time or if requested, Mrs Harb might have produced bank statements and other documents but, in the circumstances, their absence did not provide a ground for rejecting her evidence.

38. Having examined the submissions made in support of this ground of appeal, I have concluded that it has no real prospect of success and that permission to appeal on this ground should be refused.

39. This leaves the remaining ground, for which the Prince was given permission to appeal by the judge. This ground proceeds on the assumptions that Mrs Harb has established that she is unable to pay the interim costs of £250,000 and that an order that her claim be struck out unless she paid the costs would stifle her claim.

40. This ground is that: "The Judge erred in concluding, as part of his Article 6(1) analysis, at [23] of the Judgment, that the effect of the ordered re-trial was that the Respondent had not yet had a determination of her claim at first instance and that it was as if there had been no trial at first instance".

41. Put positively, the point that appeared to be made was that, for the purposes of securing the right of Mrs Harb and, it must follow, of the Prince under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the original trial before Peter Smith J followed by this court's order for a re-trial satisfied the requirement for "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" to determine their civil rights and obligations. In the skeleton argument of counsel for the Prince, it was observed that there did not appear to be any reported authority of the UK courts or the European Court of Human Rights (ECtHR) in which consideration has been given to the right of access to court where a re-trial is ordered after there has been a full trial at first instance.

42. There appeared to be a straightforward answer to this ground, as drafted. The trial before Peter Smith J and his judgment were historical facts but, following the order of this court, they had no legal significance. As a matter of law, the parties had not had a hearing to determine their civil rights and obligations.

43. Notwithstanding the terms of this ground of appeal, this was not the way in which Mr Mill developed it orally nor, to a lesser extent, was it the way it had been developed in his skeleton argument. As so developed by him, the ground became that the judge had erred in holding that the order sought by the Prince would be a disproportionate interference with Mrs Harb's right of access to a court under article 6(1). This is not the ground for which the judge gave permission nor can there be any certainty that either he or this court would have given permission for it. Mr Tager on behalf of Mrs Harb did not object to this ground being developed as it was by Mr Mill and he made

submissions in opposition to it. It would be open to us to decline to hear this ground on any basis other than that set out in the written grounds of appeal. However, as it was not a point that required lengthy or elaborate argument, we are content to deal with it in the way presented by Mr Mill.

44. In his judgment at [19] – [22], the judge referred to various authorities concerning article 6(1) and the effect of fees and orders for costs on access to a court. At [25] he accepted that it was a matter of significance that the Prince had not been paid the costs due to him but observed that, against that, it was not, as Millett LJ had said in *Metalloy Supplies Ltd v MS (UK) Ltd* [1997] 1 WLR 1613 at 1619 "an abuse of the process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail".

45. At [26], the judge acknowledged that the orders sought by the Prince would pursue the legitimate aim of ensuring the Prince receives at least some recompense for the money he expended on his successful appeal, but he concluded that "it would represent a disproportionate interference with Mrs Harb's right of access to a court under Article 6(1) because it would impair the very essence of that right".

46. Mr Mill challenged this conclusion on the grounds that it failed to take proper account of the following factors. First, the costs order was not made because of the order for a re-trial but because Mrs Harb resisted the appeal. Secondly, a substantial reason for setting aside the original judgment was the trial judge's failure to address the inconsistencies in her evidence. To that extent, she bore responsibility for the outcome. Thirdly, the order for interim costs was made despite Mrs Harb's request for time to file evidence confirming her lack of means to meet such order. In the knowledge that she maintained that she would be unable to pay the costs, this court nonetheless made an order for payment within 28 days, i.e. before there could be a re-trial.

47. Mr Mill referred us to the decision of the ECtHR in *Podbielski v Podbielski* [2005] ECHR 39199/98, which concerned the imposition of court fees. On the facts of the case, the imposition of the fees on the applicant constituted a disproportionate restriction on his rights of access to a court. Mr Mill relied on paragraph 63 of the Court's judgment:

> "63. The Court has accepted that in some cases, especially where the limitations in question related to the conditions of admissibility of an appeal, or where the interests of justice required that the applicant, in connection with his appeal, provide security for costs to be incurred by the other party to the proceedings, various limitations, including financial ones, may be placed on his or her access to a "court" or "tribunal". However, such limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved."

48. At paragraph 64, the Court said that the requirement to pay fees to civil courts could not be regarded as per se incompatible with article 6(1) but "the amount of the fees assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed are factors which are material in determining whether or not a person enjoyed his right of access".

49. Mr Mill also referred us to the ECtHR's decision in *NJDB v United Kingdom* [2016] 1 FCR 149, which concerned the availability of legal aid for an appeal to the Supreme Court. The Court reiterated that the right of access to a court was not absolute and regard must be had to the overall context, and in particular the extent to which the applicant had already enjoyed access to court.

50. Although the argument on behalf of Mrs Harb had been advanced before the judge on the basis of an interference with her rights under article 6(1), it seems to me, and Mr Tager on her behalf agreed, that the same issue with the same balance of competing factors arises at common law.

51. I turn to the factors that the Prince says were ignored or given insufficient weight by the judge in reaching his evaluative conclusion that the proposed orders would be a disproportionate interference with Mrs Harb's right to a trial of her claim.

52. The first, that the costs order was the result of Mrs Harb's unsuccessful opposition to the Prince's appeal, can be said, as Mr Tager observed, of almost every adverse costs order. Mr Mill did not suggest that there could be a general principle that it was a proportionate interference with a right to a trial to strike out or stay a claim for failure to pay an adverse costs order. Such costs orders may well result from interlocutory applications which an impecunious claimant loses, but any such general approach would set at nought the long-established and important principle expressed by Millett LJ in the *Metalloy* case. I can see no difference in principle between an adverse costs order in an interlocutory application and such an order on appeal resulting in an order for a re-trial. It was in this context that Mr Mill sought to make something of his submission that Mrs Harb had already had access to a court by virtue of the original trial, but the effect of this court's order was that, by virtue of deficiencies in the judgment, the parties had not had a fair trial. Moreover, it should be noted that the primary relief sought by the Prince on the appeal was judgment on the claim in his favour with an order that Mrs Harb pay the costs of the original trial as well as the appeal.

53. The second factor was that, in the estimation of this court, Mrs Harb's evidence at the trial had been "far from satisfactory and inconsistent with many of the important documents in the case". She therefore bore a measure of personal responsibility for the result of the appeal and the costs order. There are a number of reasons why, in my view, this is a not a factor that carries weight. First, the fundamental reason for the order to set aside the judgment in Mrs Harb's favour was not Mrs Harb's evidence but the failure of the trial judge to address important issues concerning her evidence. That is not a failure that can be laid at Mrs Harb's door. Secondly, while this court made trenchant observations about aspects of Mrs Harb's evidence – and there would otherwise have been no grounds to interfere with the judgment – it did not reach any conclusion about her evidence or the merits of her case but remitted it for re-trial. It

will be solely for the judge at the re-trial to make findings on the evidence then presented to the court.

54. The third factor relates to the terms of the CA order. As earlier mentioned, Mrs Harb submitted a skeleton argument as to costs, asking for a short time to adduce evidence as to her lack of means to meet any order for interim costs. Mr Mill submits that, because the court proceeded to make the costs order without giving Mrs Harb an opportunity to adduce such evidence, there is an implication that the costs were to be paid before there could be a re-trial. This submission seeks to prove too much. If this court had been concerned to ensure that there should not be a re-trial unless the interim costs were paid, it could have been made a term of the CA order. Instead, the order required Mrs Harb to apply for directions for the re-trial within 28 days, the same period allowed for payment of the interim costs. The only reliable inference is that this court left the Prince to pursue such remedies as were open to him. Most obviously, the Prince could seek to enforce the costs order, which conspicuously he has not done despite challenging Mrs Harb's evidence as to her means. Alternatively, the Prince could apply for orders of the type sought in his application now under appeal, leaving it entirely for the court on that application to decide on the right course.

55. In my judgment, none of the factors relied on by the Prince, whether alone or in combination, outweigh the loss to Mrs Harb of a fair trial of her claim or suggest that the judge was wrong in his conclusion that the orders sought by the Prince would be a disproportionate interference with her right to a fair trial. On this appeal, the order put at the forefront of his case by Mr Mill was a stay of the claim, rather than an order striking it out. In the absence of any evidence suggesting that Mrs Harb will in the foreseeable future come into sufficient funds to pay the interim costs – and there is none – there is no practical difference between staying and striking out the claim.

56. For these reasons, I would dismiss the appeal.

Lord Justice Newey:

57. I agree.