Neutral Citation Number: [2021] EWCA Civ 414

Case No: A4/2020/1493

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
MR JUSTICE JACOBS
[2020] EWHC 2945 (Comm)

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 23/03/2021

Before:

LORD JUSTICE HADDON-CAVE
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE POPPLEWELL

- -

Between:

ATHENA CAPITAL FUND SICAV-FIS S.C.A	**Claimant/ Appellant**
- and -	
CROWNMARK LIMITED	**Defendant/ Respondent**

- -
- -

Gary Milner-Moore (instructed by **Herbert Smith Freehills LLP**) for the **Claimant/Appellant**
The Defendant/Respondent did not appear and was not represented

Hearing dates : 18 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10 a.m. on Tuesday, 23 March 2021.

Lord Justice Popplewell:

Introduction

1. This is an appeal by Athena Capital Fund SICAV-FIS S.C.A. ("Athena"), from an order of Jacobs J dated 7 August 2020 ("the Order"). The respondent ("Crownmark") is a company incorporated in accordance with the laws of Cyprus and has been in liquidation since 1 August 2019. The Order granted Crownmark an extension of time within which to comply with an unless order granted by Andrew Baker J for the giving of disclosure of hard copy documents.

2. The extended deadline granted by the Order was 11 September 2020. Crownmark did not comply with the Order by filing a list of hard copy documents by that date (although a list was served), and indeed has not done so since. Under the terms of the Order the automatic result is that the re-amended defence and counterclaim have been struck out. From that date Athena has been free to enter judgment on both claim and counterclaim, although it has not done so, just as it would have been in early August had the Judge not made the Order under appeal. Accordingly, the pursuit of the appeal achieves no greater benefit for Athena in these proceedings than it has in any event enjoyed since 11 September 2020. Crownmark's creditors have made clear that they do not intend to fund the defence of the claim or counterclaim, and the liquidator wishes to proceed to dissolve the company. It is not necessary to address any questions of general importance in order to dispose of the appeal. In those circumstances I can explain and address the issues relatively briefly.

Factual and procedural background

3. The litigation involves a claim by Athena against Crownmark for monies allegedly due under a facility agreement. The claim is for a sum in excess of US$50 million. Crownmark served a defence and counterclaim disputing the claim and seeking sums which total the equivalent of more than US$2 million. In 2019 Athena unsuccessfully sought reverse summary judgment on the counterclaim. In March 2019 the first case management conference took place, at which orders were made for disclosure. The deadlines for disclosure were extended by agreement, and then were ultimately overtaken by events.

4. In June 2019 the court heard an application by Athena for summary judgment, which was partly successful in respect of an interest payment due under the facility agreement. Crownmark was granted permission to defend that aspect of the claim on condition that the interest was paid into court. Crownmark did not comply with the condition for payment into court and judgment was in due course entered by Athena on 11 July 2019 for US$884,722.22.

5. As a result, Crownmark entered a creditors' voluntary liquidation on 1 August 2019. Mr Constantinos Ekkeshis was appointed as liquidator.

6. As a result of the liquidation, and at the invitation of Athena, Butcher J made an order staying the proceedings in August 2019. The order provided for Athena to take steps to arrange a further CMC after expiry of the period of the stay if the case had not settled in the meantime.

7. On 10 October 2019 the first meeting of the creditors took place. Apart from Athena, there were three other creditors, namely Loberton Holdings Limited ("Loberton"), Masbate Enterprises Inc ("Masbate") and Gabi Limited ("Gabi"). Of these other three, the largest creditor was Masbate whose claim was for just short of US$1 million. Gabi's claim was for around US$250,000. The liquidation assets identified were a receivable of about US$929,000 plus US$44,000 in interest; and two choses in action, namely Crownmark's counterclaim against Athena, and a receivables claim pursuable in Cyprus against Larienta Management Limited ("Larienta"). The liquidator had taken advice from English solicitors, Brown Rudnick LLP, who had estimated the costs of the English proceedings to trial at between £500,000 and £700,000; and had advised that a continuation of the stay was necessary until such time as the creditors had indicated whether they were willing to fund the proceedings or had indicated what other approach should be taken. This was reported by the liquidator to the creditors at the meeting. The liquidator also explained that his Cypriot legal advisors had estimated the costs of taking proceedings in Cyprus against Larienta would be EUR 60,000. The liquidator explained to the creditors that he had no funds to instruct lawyers or go to court. No indication was given by the creditors at that meeting that they would provide funds for the litigation in either England or Cyprus.

8. On 31 October 2019 a second meeting took place between the liquidator and representatives of the creditors. Such meetings were sometimes referred to as meetings of a committee of inspection, but I shall refer to them as creditors meetings for convenience. The liquidator again made clear that he was without funds to undertake any work. The minutes of the meeting illustrate that there was no agreement amongst the four creditors as to the way forward and a fair amount of antagonism and ill feeling between Athena and the three other creditors.

9. When the stay imposed by Butcher J expired, the liquidator was still without funds. Thereafter on 17 February 2020 Gabi wrote to the liquidator confirming that it was willing to pay fees to enable the liquidator to continue the investigation for the benefit of all the creditors. In particular it indicated that it was willing to fund an action by the company against Larienta in Cyprus to trace assets and offered to contribute €5,000.

10. A further creditors meeting took place on 24 February 2020. By that time Gabi had provided €25,000 to fund the liquidator. At the meeting all the creditors agreed that €22,000 of that could be used to pay the liquidators fees incurred up to November 2019, leaving funds of only €3,000. The liquidator explained to the creditors that the only course of action that he could take "with minimum cost" was to proceed with the case against Larienta. With the exception of Athena, who considered such proceedings in Cyprus to be a waste of time, the creditors agreed.

11. The second CMC took place before Andrew Baker J on 13 March 2020. Brown Rudnick LLP had come off the record for Crownmark a few days earlier because it had not been put in funds. The CMC was not attended by anyone representing Crownmark. On that occasion the judge gave directions for disclosure of hard copy documents by 4 pm on 24 April 2020 ("the disclosure order"). The judge did not at that stage give directions for disclosure of documents in electronic form, or for preparations for trial thereafter.

12. Athena complied with the disclosure order. Crownmark did not. Athena sought an unless order. On 19 May 2020 Andrew Baker J determined Athena's application without a hearing and made an unless order ("the Unless Order") in the following terms:

> "Unless the Defendant provides disclosure as required by the Order of Andrew Baker J dated 13 March 2020 by way of a document list filed and served on the Claimant by 4.00 p.m. on Friday 29 May 2020, the Defendant's Re-Amended Defence and Counterclaim shall stand struck out without the need for further order or application."

13. On 26 May 2020 Crownmark made an application to vary the Unless Order to extend the deadline by two months to 29 July 2020 pursuant to CPR 3.1(7). The application was supported by a witness statement from the liquidator, which identified as the reasons for an extension firstly the Covid pandemic, and secondly that there was to be a forthcoming creditors meeting.

14. The creditors meeting took place on 22 June 2020 before that application was decided. No one was present representing Athena, but the liquidator and representatives of the other creditors attended. At the meeting the representative of Gabi said that Gabi intended to authorise the liquidator to appoint a lawyer in the UK. The liquidator responded that he would need a written confirmation from Gabi that Gabi "will fund the legal procedure".

15. On the 23 June 2020, the next day, there was a further creditors meeting at which all creditors were represented, including Athena's Cypriot lawyer. It appears from the minutes of that meeting that on 12 June 2020 Gabi had given an indication of its willingness to fund the English proceedings but in terms which left it unclear whether that meant only the current application or the case more generally. Athena had asked for clarification in an email of 19 June 2020 and the matter was again raised by its representative at the 23 June creditors meeting. In response, Gabi's representative confirmed in express terms that Gabi intended to fund not only the application to vary the Unless Order, but the conduct of the defence of the claim.

16. On 24 June 2020 Foxton J dealt with Crownmark's application to extend the disclosure deadline without a hearing. He refused the application for reasons set out in his order ("the Foxton Order"). Having been made without a hearing, the order provided that the defendant could apply for it to be set aside, varied or discharged within seven days of service in accordance with CPR 3.3(5)(b).

17. On 27 June 2020 the liquidator emailed Gabi seeking confirmation that Gabi would cover all the legal fees required for defending the UK case. In an email response of 29 June 2020, copied to the other creditors, Gabi wrote to the liquidator confirming that Gabi "will cover the whole amount of the legal fees for defending the UK case."

18. On 30 June 2020 Kennedys Law LLP ("Kennedys") was instructed by the liquidator on behalf of Crownmark in the proceedings. On 1 July 2020 Kennedys caused to be issued on behalf of Crownmark an application to set aside the Foxton Order pursuant to CPR 3.3(5)(a) and to vary the Unless Order pursuant to CPR 3.1(7). The application was supported by a first witness statement of Ms Smith of Kennedys. Paragraph 21 of the witness statement stated that the liquidator had recently obtained

funding from one of the company's creditors to pursue the counterclaim and to instruct Kennedys to act for the defendant in the proceedings.

19. As part of the exchange of evidence prior to the hearing of the application, on 15 July Ms Smith served a second witness statement. The second witness statement confirmed at paragraphs 5, 6 and 8 that there had been a change of circumstances since the Unless Order was made, namely that ongoing terms had been agreed with a creditor for funding the defence of the proceedings and pursuit of the counterclaim.

20. In the skeleton argument of Crownmark for the hearing of the application, which took place before Jacobs J on 6 August 2020, Crownmark's counsel drew attention to the principles identified in *Tibbles v SIG Plc* [2012] EWCA Civ 518 as governing the exercise of discretion under CPR 3.1(7) and contended that the relevant one was that there had been a material change of circumstances, namely Gabi's decision to fund the proceedings. The material in paragraph 21 of Ms Smith's first witness statement and paragraphs 5, 6 and 8 of her second witness statement together with the terms of the creditors meetings of 22 and 23 June, and Gabi's email of 29 June were all cited in support of a submission that there had been a material change of circumstances. In oral argument Crownmark's counsel submitted that there had been a material change of circumstances since the Foxton Order in that a commitment to funding by a creditor had been obtained. The Judge was taken through the material in Ms Smith's statements, the creditors meetings of 22 and 23 June, and Gabi's email of 29 June, on which this submission was founded.

21. On the day before the hearing of the application, Mr Ekkeshis resigned as liquidator. In his place Mr Kokkinos was appointed as liquidator. The explanation subsequently given by Mr Kokkinos for Mr Ekkeshis' resignation is that it was "for personal reasons."

22. On 7 August 2020 Jacobs J gave judgment on the application, and made the Order which set aside the Foxton Order and varied the Unless Order by extending the deadline for compliance until 11 September 2020. The Order provided:

> "Unless Crownmark provides disclosure as required by the Order of Mr Justice Andrew Baker made on 13 March 2020 by way of a document list filed and served on Athena by 4.00 pm on Friday 11 September 2020, Crownmark's Re-Amended Defence and Counterclaim shall stand struck out without the need for further order or application."

The Judgment

23. In a full and well-reasoned judgment, Jacobs J accepted the defendant's submission that there had been a material change of circumstances since the Unless Order and Foxton Order had been made. He said that at the time of those orders no funding was in place and at the time of the Foxton Order such funding was at most a possibility and a speculative possibility at that. The position was now different because funding was in place and there was now a commitment in writing.

24. He then went on to consider the factors which affected how the court should exercise its discretion in accordance with the overriding objective. He identified the principal points in Crownmark's favour as the following. There was no history of procedural

defaults by Crownmark prior to the events with which he was concerned. The claim was very substantial; the effect of disallowing the extension would be to reduce the sums to which other creditors would be entitled in the liquidation almost to vanishing point if Athena were able to enter judgment for in excess of US$50 million. Moreover, it would preclude pursuit of the counterclaim which had already been the subject of judicial scrutiny and had survived a reverse summary judgment application. The period between the Unless Order and the default on 29 May 2020, when the deadline expired, was a relatively short period in the context of the overall litigation, and occurred during the Covid pandemic when it was not unusual for extensions to be granted for compliance with orders for disclosure. He emphasised that the underlying problem with compliance had not itself been pandemic related difficulties, but that nevertheless it could fairly be said that the delay occurred during a period when extensions for compliance with disclosure obligations could be obtained fairly readily. There was some way to go before trial, with no timetable yet in place for steps to trial. The liquidator had been placed in difficulty through lack of funds, and it would be difficult to ascribe blame to him or to the company itself in relation to non-compliance with the Unless Order.

25. In relation to the last point, he observed that throughout the period, the creditors were aware of the need to provide funds, and none of them was prepared, as he put it, "to step up to the plate" at least until around the time of the Foxton Order. He regarded the key question in the case as to how he should approach a position where the company itself was impecunious but the creditors had had a full opportunity to provide funding over a period of time and had only been willing to do so at a very late stage after unless orders had been made.

26. Before returning to that question he identified what he described as powerful points made on behalf of Athena against any grant of extension. An Unless Order had been made and there was a powerful public interest in ensuring compliance. There had still been no compliance with the Unless Order. No disclosure had yet been provided and there remained uncertainty as to when it would be provided. The creditors had known since October 2019 at the latest that it was imperative to provide funding, but none of the creditors individually or collectively had been willing to "step up to the plate". By the time that Gabi had changed its mind, there had been significant developments in the English litigation including the making of the Unless Order which brought into play the important public policy considerations to which he had referred. It could properly be said that if Gabi could currently make funding available, such funding could have been provided sooner. In the judge's view there remained some uncertainty as to the extent of the funding that would actually be made available. No real detail had been provided, very little was known about Gabi, and there was no clear evidence as to whether it was or was not a related party of Crownmark. There was no evidence that the Covid pandemic had played any material part in the delays.

27. Having thus set out what he regarded as the important factors on each side, the judge observed that "an instinctive reaction to those circumstances would … lead to the conclusion that … the [Unless Order] and [Foxton Order] should stand". That was because Crownmark, and its creditors in particular, had had ample time to make up their minds as to whether or not to fund the proceedings and had decided not to do so despite having the opportunity from October 2019 onwards; Gabi had only decided to do so in June after the Unless Order was made. However, the judge went on to say

that this approach and instinctive reaction would not be appropriate in the light of the decision of the Supreme Court in *Goldtrail Travel Ltd v Onur Air Tasimacilik AS* [2017] UKSC 57; [2017] 1 WLR 3014: that decision made clear that the shareholders' distinct legal personality should be respected, and that such distinction must remain in the forefront of the analysis. He observed that although the case concerned a condition imposed for the continuation of an appeal, the principle was equally applicable where, as in the instant case, an unless order was made pursuant to CPR 3.1(3), the same rule as was being considered in *Goldtrail*. He said that if he put the distinct legal personality of Crownmark and the creditors in the forefront of the analysis, that pointed away from the instinctive conclusion which he had identified. The position was that the defendant company itself was impecunious and unable until recently to fund its defence. The liquidator himself could not be blamed for the position in which the company found itself.

28. The judge's reasoning, therefore, as he summarised at paragraph 56 of his judgment, was that if he had equated the company with its creditors he would not have granted the application; but that since he did not regard it as appropriate to equate them, it would not be inconsistent with the overriding objective for Crownmark, who had now succeeded in obtaining funding, to be deprived of the opportunity to put forward its defence and counterclaim.

Grounds of appeal

29. The judge granted permission for three grounds of appeal:

    (1) Ground 1 is that *Goldtrail* applies only to payment conditions, and is therefore not relevant to the circumstances of the present case.

    (2) Ground 2 is that even if *Goldtrail* is capable of applying as a matter of principle, it should have had no bearing on the outcome because Crownmark did not establish that the proceedings would previously have been stifled on *Goldtrail* principles. As a result, the recent availability of funding should not have been determinative.

    (3) Ground 3 is that in any event Crownmark should not be permitted to rely upon *Goldtrail* and a stifling argument in circumstances where the point could and should have been raised at an earlier stage. *Goldtrail* was only relied upon in the course of oral reply submissions at the hearing.

Events subsequent to the hearing

30. What has happened since the judgment and Order is of some significance and gives rise to an application by Athena for permission to add a fourth ground of appeal and to rely upon the evidence of what has happened as fresh evidence on the appeal.

31. On 28 August 2020 the notice of appeal was issued by Athena.

32. On 31 August 2020 Gabi wrote to the liquidator saying, "we would like to inform you that we will cease funding the whole procedure". No explanation was given in the letter for that volte face. The letter was sent to Kennedys on 1 September 2020 and Athena's solicitors were informed the following day. Kennedys applied for an order

that they had ceased to act, supported by a third witness statement of Ms Smith, and an order to that effect was made by Foxton J on 10 September 2020.

33. The next day, 11 September 2020 was the extended deadline for the filing and service of the list of hard copy documents under the Order. The liquidator served a list by email on Athena's solicitors during the course of the day. However, he did not file it, as also required by the Order. That failure has been confirmed by Athena's evidence and is apparent on CE File, and indeed was accepted by the liquidator in subsequent correspondence. This was not due to any ignorance on the part of the liquidator as to how to file a document in the Commercial Court because he used CE File to file a notice of change shortly thereafter. The effect, as I have already observed, is that the re-amended defence and counterclaim have been struck out; and Athena has been free since that time to enter judgment on the claim and counterclaim.

34. On 24 September 2020 there was a further creditors meeting at which the liquidator and representatives of all the creditors were present. On that occasion the liquidator said he had been given an estimate of fees for the UK proceedings of US$500,000. He said that there were no assets and accordingly he would not spend any further sums and would proceed to dissolve the company unless anyone could point to any assets. The evidence of Athena's Cypriot lawyer who was present is that the liquidator said in terms that Crownmark did not intend to maintain its defence and counterclaim in the English proceedings. This was not included in the minutes, despite Athena's insistence at the time that it should be. It is, however, consistent with what is contained in the minutes recording that the liquidator had said he was not prepared to spend any money and that accordingly he would proceed with the liquidation of the company because "I don't want to waste anyone's time".

35. Although Kennedys had secured an order that they had ceased to act from the Commercial Court on 10 September 2020, because they had remained without funds and without instructions since the Order under appeal, they were on the record for the appeal initiated on 28 August 2020. Accordingly, they made a separate application to this court to come off the record on the appeal on 25 September 2020, supported by a fourth witness statement of Ms Smith. Such an order was made on the 12 November 2020.

36. On 23 December 2020 the liquidator sent by email two letters in the Greek language to a generic email address of the Athena group. One of the letters said that he intended to proceed to dissolve the company.

37. On 18 January 2021 Athena's solicitors invited the liquidator to consent to judgment on the claim and counterclaim in England since he had no funds to defend the claim, and it appeared he had no intention of doing so in the light of his avowed intention to dissolve the company. The liquidator's response was that that would be a matter for the creditors to decide at a meeting which had been called for 25 February 2021.

38. On 25 February 2021 the creditors meeting took place, at which the liquidator and representatives of each of the creditors were present. At the outset the liquidator declared that the company had no assets and that "I have stopped the proceedings in England because Crownmark has no assets to pay expenses and there is no point in creating liabilities when I cannot pay them. Now … I want to apply to the [Cyprus] court in order to liquidate the Company to save time and money for everybody. … I

plan to apply for the liquidation of the Company through court. I don't have any funds. I don't have any money to pay creditors, to pay legal expenses, to pay anybody." Athena's lawyer intervened to clarify that the liquidator's position was he no longer wanted to defend the English proceedings and wanted to apply to the Cypriot court for a dissolution, which the liquidator confirmed was indeed his position.

39. Crownmark has not engaged with the court or cooperated with Athena in relation to the appeal. It did not appear and was not represented at the hearing of the appeal.

40. This subsequent history since the judgment and Order under appeal, and the material which it generated, gave rise to an application by Athena for permission to add a fourth ground of appeal namely that there was in fact no material change of circumstances at the time of the judgment and Order under appeal; the judge was misled into finding that there was a material change of circumstances on the evidence from Gabi that it intended to fund the ongoing conduct of the proceedings, whereas, it is submitted, the material now revealed that Gabi never intended to do any more than fund the application to extend the Unless Order deadline, and withdrew any further funding once the Order had been obtained. At the hearing the Court granted that application for permission to add the fourth ground of appeal, and gave permission for Athena to adduce the additional fresh evidence which was not available at the time of the judgment.

Conclusions

41. It is convenient to address Ground 4 first.

42. The judge made clear in his judgment that the starting point, and necessary foundation for the exercise of his discretion, was that Crownmark had established a material change of circumstances. It had been common ground that this was a necessary threshold for Crownmark in accordance with the principles identified by this court in *Tibbles v SIG Plc*. That was the basis for the remainder of the judge's reasoning. The material change identified was that Gabi had by then undertaken to fund the future conduct of the proceedings not merely in relation to the application itself, but at least for the medium term and in any event up to disclosure at the very least.

43. I would accept the submission made on behalf of Athena that the material which has emerged since the judgment and Order gives rise to the overwhelming inference that it was never Gabi's intention to do more than fund the application to set aside the Foxton Order and vary the Unless Order; that Gabi had no firm intention of funding the further conduct of the proceedings; and that accordingly there had been no material change of circumstances and Jacobs J was misled in that respect.

44. The evidence of Ms Smith of Kennedys in her third and fourth witness statements was that Kennedys had not been provided with instructions, or put in funds, to progress the next step in the proceedings after the Order of 7 August, namely providing hard copy document disclosure, despite repeatedly pressing for instructions. In short, funding and instructions had ceased once the application had succeeded. This is inexplicable if Gabi really intended to fund the proceedings going forward. Gabi's letter to the liquidator of 31 August 2020 said that funding would cease, but funding had in fact

ceased immediately after the Order under appeal. No explanation was given in that letter for the change in position since the beginning of the month.

45. In correspondence with the liquidator, Athena's solicitors sought an explanation for the change in stance on 31 August. The explanation given by the liquidator in his letters of 2 October 2020 and 18 November 2020 was that Gabi had previously assumed it could cover the legal fees required for the case, but having asked for a costs estimate from Kennedys, had discovered that it couldn't afford such fees, not previously realising the immense difference between costs in England and Cyprus. The estimate was said to said to have been given by Kennedys on 21 August 2020 and to be £457,000 plus VAT for both past and future costs. This is perhaps consistent with the report by the liquidator to the creditors meeting on 24 September of a costs estimate of US$500,000 if, but only if, the latter refers to future fees, although Ms Smith does not refer to having given such an estimate in her third or fourth witness statement, and the document has not been produced. Nevertheless, if one assumes that this estimate was given by Kennedys on 21 August 2020, the suggestion that it was this estimate which changed Gabi's mind about funding must be disingenuous for two reasons. First, it cannot explain why Gabi failed to put the liquidator in funds between 7 August and receipt of the estimate on or after 21 August to enable Kennedys to get on with the conduct of the proceedings, and in particular the urgent work required to ensure that hard copy disclosure could be completed before the expiry of the new deadline, backed as it was by an unless order. Ms Smith's third and fourth witness statements make clear that she repeatedly sought instructions and funds. Secondly, the evidence suggests that Gabi was well aware of the general scale of the likely costs of the action, and the sharp contrast with costs in Cypriot proceedings, prior to the hearing before Jacobs J and at the time when it unequivocally purported to assure the liquidator, and through him the court, of its intention to fund the ongoing proceedings. At the creditors meeting of 23 June 2020 Gabi confirmed that it had asked for an estimate of the "fees for the whole procedure" from Kennedys and that it was willing to fund representation before the English Court not only for the application but for defending the claim. This was confirmed in the letter from Mr Kokkinos of 18 November 2020, in which he said that the previous liquidator had received a letter from Kennedys on 30 June 2020 stating that it was not unusual for costs of litigation of this size to reach £350,000 plus VAT. Brown Rudnick LLP's estimate, notified to the creditors, including Gabi, the previous autumn at the first creditors meeting on 10 October had been of £500,000 to £700,000. The contrast with the costs of Cypriot proceedings was apparent from the advice of the Cypriot lawyers, also relayed at that meeting, that they had estimated that the costs of taking proceedings in Cyprus against Larienta would be €60,000.

46. Moreover, in evidence served for this appeal Athena's solicitor identified this material and said that the inference to be drawn from it was that Gabi had only ever intended to fund the application, not the ongoing proceedings. Neither the liquidator nor Gabi has sought to challenge or refute that assertion in subsequent evidence or correspondence. In my view it is the proper inference to draw.

47. Accordingly, I would allow the appeal on Ground 4. That renders it unnecessary to address grounds 1 to 3 and Mr Milner-Moore was not invited to develop them in his oral argument. In those circumstances I express no view on their merits.

Lady Justice Nicola Davies:

48. I agree.

Lord Justice Haddon-Cave:

49. I also agree.