Neutral Citation Number [2018] EWHC 1025 (Ch)

IN THE HIGH COURT OF JUSTICE **CH-2017-000173**

(CHANCERY DIVISION)

ON APPEAL FROM DEPUTY MASTER COUSINS

BEFORE:

MR ANDREW HOCHHAUSER QC **3 May 2018**

(Sitting as a Deputy Judge of the Chancery Division)

BETWEEN:

ZINC COBHAM 1 LTD (in administration) AND OTHERS	**Appellants/ Claimants**
- and -	
1) ADDA HOTELS (an unlimited company) 2) PUCKRUP HALL HOTELS LTD 3) HILTON WORLDWIDE INC	**Respondents/ Defendants**

Hearing dates: 26 and 27 April 2018

KIRK REYNOLDS QC and JULIAN GREENHILL QC (instructed by Ashurst LLP) appeared on behalf of the Appellants/Claimants

MARK WONNACOTT QC and ELIZABETH FITZGERALD (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Respondents/Defendants

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

ANDREW HOCHHAUSER QC

INTRODUCTION

1. On 10 October 2017, Warren J granted permission to the Appellants to appeal from the Order of Deputy Master Cousins dated 27 March 2017 ("**the Strike Out Order**"). That Order granted the Respondents' application pursuant to CPR 3.4 and/or for summary judgment under Part 24 and struck out those parts of the Appellants' Particulars of Claim dated 12 May 2016 which sought the remedy of specific performance, namely the references to specific performance in paragraph 24, and paragraphs (2), (3) and (4) of the Prayer therein. For thirteen reasons set out at paragraph 52 of his judgment ("**the First Instance Judgment**"), the Deputy Master confined the Appellants' remedy to damages at common law, stating at paragraph 53, that the Appellants had no real prospects of obtaining specific performance at trial, and the Particulars of Claim disclosed no reasonable grounds for seeking such relief. He concluded: "*There is no good reason why disposal of these claims should await trial.*"

2. The hearing of the appeal came before me on 25 and 26 April 2018 for one and a half days. The Appellants were represented by Kirk Reynolds QC, leading Julian Greenhill QC and the Respondents were represented by Mark Wonnacott QC, leading Elizabeth Fitzgerald. I am grateful to them for their oral and written submissions.

FACTUAL BACKGROUND

3. The Appellants are all subsidiaries of Zinc Hotels (Holdings) Limited. I will refer to the Appellants collectively as "**Zinc**". Zinc are the leasehold owners of the reversion of ten individual hotels ("**the Hotels**"). The Hotels are situated in a number of locations throughout England, namely, Cobham; Croydon; East Midlands Airport; London Kensington; Leeds; Northampton; Nottingham; Tewkesbury; Watford and York. Each of the Hotels is operated under the "Hilton Hotels" brand. The Hotels used to be owned by the Hilton Group, but were the subject of a sale and leaseback transaction in 2002. The Respondents, to which I will refer collectively as "**Adda**", occupy the various Hotels pursuant to ten principal leases ("**the Leases**"). Each lease is dated 30th August 2002 and granted by the freeholder of each hotel under which each was demised for a term expiring on 31 December 2029. For present purposes each lease is in materially similar terms.

4. The Leases contain the following express tenant covenants:

(1) At clause 3.5.2, a covenant:

"To clean, decorate or otherwise treat the Hotel (where appropriate in accordance with the manufacturer's recommendations) in accordance with the Operating Standards and to a standard befitting the Permitted Use."

(2) At clause 3.9.1, a covenant:

"Not to use the Hotel otherwise than for the Permitted Use."

(3) At clause 3.12.1, a covenant:

"... to maintain active trade in substantially the whole of the Hotel in accordance with the Operating Standards."

(4) At clause 3.12.3, a covenant:

"At all times to keep the Hotel attractively laid out to a proper and reasonable standard consistent with the Permitted Use."

(5) At clause 3.17, a covenant:

"To permit the Landlord and all persons authorised by the Landlord to enter the Hotel: ... 3.17.1.3 to satisfy itself that the Tenant is not in breach of its obligations under this Lease ..."

5. The material parts of the definition of "**Permitted Use**" are "*primarily use as a first class hotel of a type that the Tenant could reasonably be expected to operate having regard to the location and prevailing economic climate of the location in which the Hotel is situate, trading in accordance with the Operating Standards...*". Operating Standards are defined in the Leases as the "**Hilton Standards**", as being those applicable based upon documentation issued by the Hilton Group from time to time. The parties are agreed that for present purposes the applicable Operating Standards are the "*Hilton Hotels Brand Standards – United Kingdom.*" These are said to be "*substantially similar*" to the "*statements operating and other standard procedures, policy and physical standards of building*" which were contained in the documents provided to the landlords before the Leases were granted.

6. During the period from July to September 2015 Zinc undertook an inspection of each of the Hotels pursuant to clause 3.17 of the Leases. In the course of those inspections Zinc purportedly identified numerous respects in which the treatment, layout, physical

standard and condition both of the building fabric, and the services within each, of the Hotels, did not comply with the Operating Standards.

7. On 22 March 2016 Zinc served on Adda ten schedules entitled Breaches of the Operating Standards in relation to each of the Hotels ("**the Schedules of Breaches**"). Each one of these Schedules of Breaches set out what are contended to be a substantial number of alleged breaches of Hilton's obligations to comply with the Hilton Standards, together with the remedy required. At the hearing below, reference was made by the Deputy Master to the thirteen page schedule of alleged breaches and remedial works served by Zinc on Adda relating to the Cobham Hotel ("**the Cobham Schedule**"). In the column headed 'Remedy' in the Cobham Schedule, Zinc indicated to Adda the specific remedial work which is required to be carried out in order to comply with the Hilton Standards.

8. Despite Zinc requiring Adda to undertake the work necessary to bring each of the Hotels into compliance with the Hilton Standards, Adda have failed so to do.

THE PROCEEDINGS

9. By the Claim issued on 12th May 2016, Zinc seek a declaration from the Court that Adda are obliged under the Leases to trade, operate and maintain each of the ten Hotels in a manner consistent with the Hilton Standards. The ten Schedules of Breaches were appended to the Particulars of Claim at paragraph 19. By reference to these Schedules of Breaches, Zinc seek specific performance of Adda's obligations to comply with these standards by remedying the breaches and/or damages for breach of covenant.

10. On 13th June 2016 Adda made a Part 18 Request for further information of the Particulars of Claim, including a request for further information of the alleged diminution in value of the reversionary interest of Zinc. This request was answered in the Part 18 Response dated 13th October 2016 to the effect that the case for Zinc is that its real loss resulting from Adda Hotels' failure to comply with the Hilton Operating Standards is "*... very difficult accurately to quantify, as a result of which the remedy of common law damages is inadequate to compensate them*". Zinc then go on to state:

> *"...Any figures to which [Zinc] were to provide in response to the above request would, to a great extent, be notional and there would be a significant risk that even if those figures were to be accepted by the Court, an award of damages in that amount would fail to be properly reflective of*

the full extent of [Zinc's] loss due to the complexity and subjectivity of the valuation issues involved. Zinc therefore decline to provide such figures.

[Zinc's] case on diminution in value of its reversions is as follows. [Adda's] failure to comply with the Hilton Hotel Standards would reduce the price that a potential purchaser of the reversions would be willing to bid. This would be the case regardless of whether [Adda's] non-compliance with the said Standards would have had any effect on the rent payable under the Leases. Compliance by [Adda] with the Hilton Hotel Standards would increase the revenue and profitability of each of these Hotels and would increase their open market rental values. However, [Zinc] accept that by reason of the complex rent provisions in the Lease, they are unable to contend that the rent payable under any given one of the Leases would necessarily thereby be increased.[1] *Nonetheless, in formulating his bid a potential purchaser would apply a different investment yield to the Hotels in these circumstances in order to reflect [Adda's] failure to comply with their obligations and to properly maintain the Hotels. This would reduce the price a potential purchaser would be willing to pay for Zinc's reversions. The extent of the yield shift in the investment yield which would be applied by a potential purchaser to calculate the reduction in his bid to reflect [Adda's] non-compliance is difficult to estimate with precision. However, it is [Zinc's] case that the shift in the investment yield which would be applied by a potential purchaser would produce a significant reduction in the amount of a potential purchaser's bid for each Hotel running into many millions of pounds. The Claimants' will rely on expert evidence at the trial of this matter in support of its case set out above."* [Emphasis added]

11. The claim in damages has been explained to mean that this includes a claim for common law damages, although the Prayer to the Particulars of Claim itself seeks "*damages for breach of covenant in addition to or in lieu of specific performance*". The ground of the claim for common law damages seems to be based upon the contention that the reversions immediately expectant upon the terms created by the leases are in some way rendered less valuable. As pleaded, and according to the evidence of Mr Cohen referred to in footnote 1 below, it does not mean, apparently, that the failure to trade in accordance with the Operating Standards has made any difference to the rent payable.

12. Accordingly, it is submitted by Adda that Zinc have declined to place a figure on their claim for common law damages. Zinc complain that it would be complicated (but not

[1] See also the first sentence of paragraph 18 of the First Witness statement dated 14 October 2016 of Mr Roger David Cohen, of Berwin Leighton Paisner LLP, solicitors then acting for Zinc, who makes a similar point.

impossible) for them to prove the amount of that loss at trial. As stated in paragraph 10 above, in their response to the Part 18 request they contend that "*its real loss arising from [Adda's] failure to comply with the Hilton Hotels Standards is very difficult accurately to quantify, as a result of which the remedy of common law damages is inadequate to compensate [Zinc]*".

13. In essence, Zinc is seeking an order from the Court that Adda carry out over £100 million of works to the Hotels. The basis for this claim is that Zinc assert that Adda are obliged to do such works pursuant to covenants contained in the Leases which, properly interpreted obliges Adda "*at all times to trade, operate and maintain each of the Hotels in all respects in a treatment, layout, physical standard and condition that is consistent with the [Operating Standards].*"[2]

14. This led to Addba's application to strike out Zinc's claim insofar as it sought the remedy of specific performance,

THE FIRST INSTANCE JUDGMENT

15. At paragraph 52, the Deputy Master gave the following reasons for acceding to Adda's application:

> "(1) The basis of Zinc's case for seeking specific performance has, with all due respect to their legal advisers, an air of unreality and fictionality about it. Zinc are seeking to persuade the Court to make an order that Adda Hotels carry out works costing more than £100m to the Hotels (or to pay damages in lieu). It is claimed that the loss to Zinc arises by reason of the diminution in the value of the reversionary interest in the Hotels is substantial.
>
> (2) However, it seems to be accepted and admitted by Zinc that this will not make any difference in terms to the rent received from their investments. Further, Zinc seem to be unable to demonstrate that the failure to maintain active trade in accordance with the Operating Standards results in the various reversions being rendered less valuable. Zinc have been unable to produce any figure in support of that claim, although it is said to run into many millions of pounds.
>
> (3) As Zinc state, it will be expensive and complicated for them to prove the amount of that loss at trial, although it is said not to be impossible. The precise extent of such yield shift is "as a matter of valuation practice,

[2] See paragraph 16 of the Particulars of Claim.

notoriously difficult to estimate and the amount of the diminution is commensurately difficult to quantify".

(4) Thus, it is contended that expert evidence will be relied upon at Trial to demonstrate that Zinc is suffering real and substantial loss, but also that that loss is difficult to quantify with precision. However, they already appear to have commissioned and received an Expert's Report, but this has not been disclosed to Adda Hotels.

(5) The Court will be asked to, and will be able to specify, so it is contended, precisely what works are required to be carried out in order to specifically perform the obligation. It is also said that this is not a case where a potentially infinite number of applications to the Court might be required in order to enforce and establish compliance by Adda Hotels. I disagree with this somewhat simplistic interpretation of what the Court will be enjoined to do.

(6) Insofar as the Cobham Hotel is concerned, the works sought to be carried out by Zinc are more than £8 million the basis of which can be found in the Schedules of Alleged Breaches and Remedial Works annexed to the Particulars of Claim. Examples of what is sought to be effected, and the potential difficulties that a Court may encounter in enforcing and policing any such orders made for specific performance on the basis sought, are set out in the Counsel's snapshots as reproduced in Appendix 1. Such illustrations were fortified by Leading Counsel during his submissions.

(7) I appreciate that a distinction can be made between a case where an order is being sought to require a defendant to carry on an activity, and an order which is being sought which requires the defendant to achieve a result. However, the remedies sought in the present case in my judgment, cannot easily be divisible between one and the other, and there is considerable imprecision in the analysis set out in the Cobham Schedule. It would be a hard task for the Court to embark upon a process of differentiation throughout the thirteen pages of ten Schedules of Breaches between those covenants which require the defendant to carry on an activity, and those which require it to achieve a result.

(8) For their part, Zinc contend that although the covenant is framed as a positive covenant, it is not a requirement to maintain trade which is being sought to be enforced, but the requirement to maintain trade in accordance with the Operating Standards. I reject that interpretation.

(9) In my judgment seeking the grant of an order for specific performance is inappropriate in the circumstances as the covenants sought to be enforced, and in particular, clause 3.12.1 is a positive covenant both in form and substance. As Leading Counsel for Adda Hotel submits, (which I accept) if

the Court cannot grant specific performance of the principal trading obligations, then it cannot grant specific performance of the ancillary parts.

(10) In order to enforce such a covenant there would undoubtedly have to be constant supervision having regard to the thirteen pages of the Cobham Schedule, and the only enforcement mechanism would be contempt of court. This would be a wholly inappropriate method of seeking to achieve the result sought, when damages would be an adequate remedy in the circumstances.

(11) In summary, there is a very high threshold for Zinc to overcome in its claim to seek the grant of specific performance. In my judgment, this is an inappropriate exercise of the Court's discretion to be asked to make an order for specific performance as Zinc cannot demonstrate that they have a legitimate interest extending beyond the pecuniary compensation arising from the alleged breach of contract.

(12) I find in the present case that damages would seem to be an adequate remedy in the circumstances following the general principle, and that specific performance is unlikely to be ordered in such circumstances. In the absence of any substantive evidence demonstrating that Zinc are likely to have suffered some additional type of loss or disadvantage going beyond mere financial loss, the Court should not be asked to make an order for specific performance.

(13) The claim, in short, is a claim for pure economic loss."

THE ISSUE ON THIS APPEAL

16. Zinc contends that the Deputy Master erred in law when acceding to Adda's application. The Grounds of Appeal dated 10 July 2017 run to three pages. I do not set them out in this Judgment, but attached them as an Appendix.

17. I remind myself that pursuant to CPR Part 52.21, this appeal is a review and not a re-hearing. I was not invited to take a different approach as permitted by Rule 52.21(1)(b). I have to ask myself whether the Deputy Master was entitled to make the Strike Out Order, on the basis of the evidence before him and applying the correct legal principles, both in relation to the provisions of CPR3.4 and Part 24, and in relation to the authorities governing the Court's ability to grant the equitable remedy of specific performance.

CPR 3.4 and CPR 24 – the relevant legal principles

18. The legal principles which govern the two applications before the Court are well established. The power to strike out a statement of case is set out in CPR 3.4. At sub-paragraph (1), it is made clear that reference to a statement of case includes reference to part of a statement of case. Sub-paragraph (2) states that the court may strike out a statement of case "*if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing the claim.*"

19. Mr Reynolds drew my attention to the judgment of Peter Gibson LJ in the Court of Appeal decision of **Hughes v Richards (t/a Colin Richards & Co** [2004] EWCA Civ 266, [2004] P.N.L.R.35; [2004] EWCA Civ 266, where he stated at [22] "*The correct approach is not in doubt: the court must be* ***certain*** *that the claim is bound to fail." Unless it is certain, the case is inappropriate for striking out (see* ***Barrett v Enfield London Borough Council*** *[2001] 2 A.C. 550 at p. 557 per Lord Browne-Wilkinson)...*"

20. The power to award summary judgment is to be found in CPR 24.2, which, so far as material, states that:

> *"The court may give summary judgment against the claimant ... on the whole of the claim or on a particular issue if-*
>
> *(a) it considers that:*
>
> *(i) that the claimant has no real prospect of succeeding on the claim or issue ... and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial."*

21. The relevant principles were summarised by Floyd LJ in **TFL Management Services Limited v Lloyds TSB Bank Plc** [2013] EWCA Civ 1415, [2014] 1 WLR 2006 at [26] to [27]. In that passage, Floyd LJ referred to an earlier decision of the High Court in **Easy Air Limited (Trading as Open Air) v Opal Telecom Limited** [2009] EWHC 339 (Ch) in the judgment of Lewison J (as he then was) at [15]. For present purposes, I would set out the relevant principles which are summarised without citation of the authorities which are referred to. Those principles were summarised in the following way:

" .. the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success ...

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...

iii) In reaching its conclusion the court must not conduct a 'minitrial'...

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should

be allowed to go to trial because something may turn up which would have a bearing on the question of construction ..."

22. To that summary of principles, Floyd LJ added the following observation at [27] of his judgment:

> *"... the court should still consider very carefully before accepting an invitation 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, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action ... Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; ... Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy ..."*

23. Four further points are to be noted. First, the criterion "real" is not one of probability, it is the absence of reality; see Lord Hobhouse in **Three Rivers District Council v Bank of England (Number 3)** [2001] UKHL 16, [2003] 2 AC 1 at paragraph 158. Secondly, an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence; see the notes in the White Book at paragraph 24.2.3 and the decision of the High Court in **Apovdedo Nv v Collins** [2008] EWHC 775 (Ch). Thirdly, in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief. The language of CPR 24.2 ("*no real prospect ... no other reason*") indicates that, in determining the question, the court must apply a negative test. The respondent's case must carry some degree of conviction (see the notes to the White Book at paragraph 24.2.5 p769). Fourthly, the facts must be presumed in the claimant's favour. As stated by Jay J in **James Bowen v Commissioner of Police for the Metropolis** [2015] EWHC 1249 (QB) at [3]: "*In line with well-established principles, discussed at great length below, the evidence cannot be tried at this stage and the facts must, unless plainly contradicted by insurmountable material or otherwise wholly fanciful, be assumed in the claimant's favour.*"

24. I was also taken by Mr Wonnacott to Rule 1.4. entitled "the Court's duty to manage cases.", which at 1.4.1 requires the court to further the overriding objective by actively managing cases, including at 1.4.2(c) "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others.*"

THE RESPONDENTS' APPLICATION TO ADDUCE FURTHER EVIDENCE

25. Since the Strike Out Order was made, there have been certain factual developments. By its Respondent's notice, Adda has applied to adduce further evidence in that regard. That application was supported by two witness statements dated respectively 24 October 2017 and 19 April 2018 from Anna Ralston, a senior associate at CMS Cameron McKenna Nabarro Olswang LLP, which represents Adda.

26. There was no objection on behalf of Zinc to the additional evidence being adduced, although it was argued that its relevance was doubtful.[3]

THE NATURE OF THE ADDITIONAL EVIDENCE

27. In her first witness statement and the documents exhibited thereto, Ms Ralston drew to the attention of the Court, the following facts:

    (1) Shortly after the Strike Out Order was made, Zinc decided to market for sale its reversionary interest in the Hotels.

    (2) On 13 July 2017 it served pre-emption notices on Adda, as required by the leases, offering the Hotels to Adda for £600,000, 000. Adda had 30 days to respond.

    (3) Under the terms of the Leases, were the offer rejected, which it was, for a period of six months after the expiry of the 30 period referred to in sub-paragraph 2 above, Zinc could offer the Hotels for sale to a third party for a price not less than 95% of the price offered to Adda. That period has expired.

    (4) In August 2017 an Investment Memorandum ("**the IM**") had been produced by Jones Lang LaSalle Ltd ("**JLL**") and Savills UK Ltd ("**Savills**"), marketing the Hotels on behalf of Zinc. There was no asking price contained in the IM, but instead there was a tender process, whereby offers were invited.

[3] Day1/p4/lines 11-24.

28. In her second witness statement, she drew the Court's attention to the following further developments:

(1) On 9 January 2018, Zinc went into administration.

(2) On 6 March 2018, the administrators of Zinc filed a report entitled "AM03: Notice of administrator's proposals." Attached to that was a document dated 2 March 2018, containing the Administrators' proposals ("**the Proposals**").

(3) From the Proposals, it is clear that:

(i) During 2017 a number of defaults occurred under a senior facility agreement dated 11 November 2014 ("**the SFA**") between Zinc and its lenders, which are described as "**the Secured Parties**".

(ii) The estimated liabilities to the Secured Parties were £519 million at the date of appointment.

(iii) JLL and Savills officially launched the marketing process on 4 September 2017. This resulted in two leading offers, one for the Kensington Hotel and one for the other nine Hotels.

(iv) Heads of Terms have been entered into with the preferred bidder of Kensington, but the date is not stated. There appear to have been no agreed Heads of Terms for the other nine Hotels, which remain marketed for sale, and on 26 March 2018, a new IM relating to solely those nine Hotels was produced.

(v) The estimated return to the Secured Parties is dependent on the amount achieved by the sale of the Hotels which was then (and remains) uncertain, and there will be nothing available to the general body of creditors unless the Secured Parties are paid in full.

(vi) The Administrators think that Zinc will have insufficient property to enable a distribution to be made to unsecured credits other than via the Unsecured Creditors Fund in one of the companies, ZHL, which only will contain a maximum of £200,000.

THE PARTIES' SUBMISSIONS

29. Both Zinc and Adda have filed detailed skeleton arguments, and supplemented those with oral submissions, spanning one and a half days. I do not intend to set out in full every point made, but I will do so in summary form below. Suffice it to say I have considered carefully each point that has been made on behalf of both parties.

ZINC'S SUBMISSIONS

30. Zinc submitted that the Deputy Master wrongly reversed the burden of proof and placed the evidential burden on Zinc to demonstrate on the application before him that Zinc had a real prospect of success in obtaining that remedy. He should instead have recognised that the burden lay on Adda (as the applicant), to show that Zinc had no such prospects of success: **ED&F Man v Patel** [2003] EWCA Civ 472 at [10]."[4] Adda failed to adduce any evidence so to establish either that there was no or little diminution in value of the reversion or that the quantification of common law damages would be straightforward.

31. Zinc contended that the Deputy Master erred in accepting Adda's submission that the case for specific performance had an "*air of unreality and fictionality*" about it. It submitted that this is a "*paradigm case where damages are difficult to quantify.*" Adda's application was premature. It was inappropriate to determine whether specific performance was a viable remedy, even before there had even been a Case Management Hearing and when all the evidence had been disclosed. It could not be said now that there was no real prospect of success. When pressed why certain documents had not been disclosed, such as the valuation advice obtained by Zinc from an expert in relation to the report of the Hotels, it maintained that it would be unfair to require them to disclose certain documents to Adda at this early stage in proceedings, prior to the exchange of experts' reports in the normal way. Indeed, Mr Reynolds submitted it was arguable whether expert evidence would be appropriate in a strike out application.

32. Zinc relied upon the dictum of Peter Gibson LJ in **Hughes v Richards (t/a Colin Richards & Co)** referred to at paragraph 20 above that an application to strike out should not be granted unless the court is certain that the claim is "*bound to fail*". This

[4] Paragraph 31 of Zinc's Skeleton.

was not that case. Mr Reynolds submitted it was not appropriate at this stage to conduct a mini trial or to try and reach firm conclusions about what is likely to happen or could happen at trial. The trial judge should not be prevented from considering whether or not to grant the equitable remedy of specific performance, after hearing all the evidence.

33. It was submitted that the Deputy Master failed properly to take into account that damages would be an inadequate remedy given the difficulty in evaluating the loss with precision, because any figure identified would be notional and would fail properly to reflect the full extent of Zinc's loss, due to the complexity and subjectivity of the valuation issues involved. Mr Reynolds referred me to the Court of Appeal judgment in **Arab Bank Plc v John D Wood Ltd** [2000] 1 WLR 857, and in particular the judgment of Mance LJ at [18], which recited with approval the description by Wright J, the trial judge below, of the approach to be adopted by a reasonably skilled and careful surveyor when carrying out a valuation. In particular he pointed to the passage at p. 865C-H, dealing with the "all risks" yield figure, which is applied to the rental value of the properties in question and the various factors which are taken into account in assessing what that figure should be. The judge there described the exercise of valuation as "*an art not a science*" and that "*a series of otherwise perfectly competent and sensible valuations on a given property may produce a range of figures which may well be the subject of argument but cannot be legitimately criticised*". The permissible margin of error may be generally 10 per cent either side of a figure which may be said to be the "right" figure, and in exceptional circumstances that may extend to 15." Zinc submitted that it is this difficulty in valuation that leads to them having a "*legitimate interest extending beyond pecuniary compensation for the breach*": see per Lord Neuberger in **Cavendish Square Holding EV v Makdessi** [2015] UKSC 67, [2015] 2 WLR 1373 at [30]. Specific performance would amount to full compensation, unlike common law damages, where the evaluation may not adequately demonstrate the loss Zinc claim to have suffered. The Deputy Master was wrong to conclude "*damages would to be an adequate remedy in the circumstances*". The potential breaches can only be remedied properly by requiring Adda to perform those parts of the contract they may be found to have breached. Specific performance would be an easier task than awarding damages.

34. Despite Zinc's Response dated 13th October 2016 to the Part 18 Request and the evidence of Mr Cohen referred to at paragraph 11 above, it was Zinc's submission

before the Master and before me on this appeal that it may yet be the case that the evidence in these proceedings would show that compliance with the Hilton Hotels Standards could either now or in the future trigger the payment of a rent calculated as a percentage of gross turnover in relation to one or more of the Hotels. This needed to be taken into account in addition to the problems related to calculating the yield, described above.

35. The Deputy Master held that it would be a hard task for the trial judge to distinguish between which standards require a Defendant to carry on an activity (which is not permitted) or achieve a result (which is permitted). Whilst Mr Reynolds accepted that the Deputy Master was right to recognise this distinction between the making of an order to carry on an activity and an order to achieve a result, he submitted that "*the task of differentiating between those obligations which require a result and those which require the carrying on of an activity is a fact- sensitive task. It is quintessentially a task for the trial judge to undertake in the light of the evidence at trial. It might prove to be a "hard task" for the trial judge in relation to some of the items in dispute, but that does not render the task impossible or inappropriate at trial, less still a task which the Master should pre-empt by striking it out at an interlocutory stage.*"[5] Here Adda had drawn up the detailed Operating Standards, namely the Hilton Standards, precisely so there could be no doubt about the standard to be met. He drew my attention to two authorities where specific performance had been ordered where several works had to be carried out to achieve a result, namely:

(1) **Rainbow Estates Ltd v Tokenhold Ltd** [1999] Ch 64, a decision of Lawrence Collins QC sitting as a deputy High Court Judge (as he then was), where he held there was no constraint preventing the court from ordering specific performance of a tenant's repairing covenants where damages were not an adequate remedy, in appropriate circumstances, where the required work was sufficiently clearly defined and the order was not being sought by the landlord simply to harass the tenants (see in particular pp. 69E-70H);

(2) **Airport Industrial GP Ltd and others v Heathrow Airport Ltd and AP16 Ltd** [2015] EWHC 3753 (Ch), where Morgan J ordered specific performance of an obligation on the part of the second Defendant under the relevant lease to build

[5] Paragraph 58 of Zinc's Skeleton.

a car park on part of the Heathrow Express site for 280 cars. I was referred in particular to his analysis at [115]-[116] of the **Tokenhold** and **Co-operative Insurance** cases. The important distinction to be drawn here is that in the Airport Industrial case the appropriateness of making an order of specific performance was not disputed [see [118]).

36. Mr Reynolds accepted that on the authority of **Co-op Insurance** case at p. 12C, it was settled practice that the Court will not grant mandatory injunctions requiring persons to carry on a business. He submitted, however, that whilst Zinc would be unable to obtain an order for specific performance that Adda actively carrying on trading at the Hotels, since the trading activity was being carried on, Zinc was entitled to obtain an order for specific performance that such active trade was carried on "*in accordance with the Operating Standards*". The Deputy Master erred in law in reaching the contrary conclusion that the court cannot grant specific performance of the "ancillary parts" of that covenant, relying on **Ryan v Mutual Tontine** [1893] Ch 116. That case has been substantially diluted over the years, as made clear by Lawrence Collins QC in the **Tokenhold** case.

37. In relation to items in the Schedule of Breaches annexed to the Particulars of Claim, the Deputy Master was wrong to accede to the submissions made on behalf of Adda that there were potential difficulties in policing such orders, given the nature of some of the alleged defects, as illustrated by the matters set forth in Appendix 1 to his Judgment and further to conclude "*It is also said that this is not a case where a potentially infinite number of applications to the Court might be required in order to enforce and establish compliance by Adda Hotels. I disagree with this somewhat simplistic interpretation of what the Court will be enjoined to do...*" There was nothing complicated or hard to understand about the remedial work required. These are issues which will be worked through and resolved at trial on the evidence before the Court. The Deputy Master further erred in concluding that (a) there would need to be "*constant supervision*" to police the order and (b) the "*only enforcement mechanism would be contempt of court*", which would be "*a wholly inappropriate method seeking to achieve the result sought, when damages would be an adequate remedy in the circumstances.*" Based on the submissions summarised at paragraph 34 above, there was no basis at this stage for concluding that common law damages would be an adequate remedy. His final reason "*The claim, in short, is for pure economic loss*" was no more than a rephrasing of his

conclusion that Zinc was unable to demonstrate that it had a legitimate interest in obtaining anything more than pecuniary compensation. The phrase "*pure economic loss*" in the context of the present claim was odd, since it is one more generally encountered in claims in tort to distinguish between financial loss and loss resulting from physical damage to persons or property, which does not arise here.

38. When questioned on what the material difference would be if this Court were to permit specific performance as a remedy at trial in terms of time and cost, Mr Reynolds' submission was that that there will be very little difference in the expenditure for preparation and the hearing itself because the work undertaken to assess damages would result in the same work undertaken for specific performance.

39. The fact that the reversionary interest in the Hotels may be sold by the Administrators did not affect the inappropriateness of striking out the claim for specific performance now. This appeal should be granted because a likely consequence of the sale of each of the Hotels is simply that the purchaser will stand in the same shoes as Zinc, when the proceedings were issued and as the Administrators do now. The continuing benefit of the tenants' covenants will belong to the new landlords and will be enforceable by them in any way, including by specific performance.

40. In the circumstances, Zinc submitted that the appeal should be allowed, the Strike Out Order overturned and the paragraphs relating to specific performance should be restored.

ADDA'S SUBMISSIONS

41. Adda's principal submission is that the Deputy Master applied the correct legal test and made no error of principle. The Court has the power to strike out any statement of case and summary judgment is available against a claimant in any type of proceedings, including claims involving a discretionary remedy. Specific performance is an equitable discretionary remedy, but one which is exercised on well-settled principles. If, having regard to those principles, the court concludes that a claim for specific performance has no real prospect of success, the court has an obligation to dispose of the claim summarily to further the overriding objective: see CPR Part 1.4(1) and (2) (c).

42. Mr Wonnacott pointed to three practical benefits to be obtained by confining Zinc's remedy to common law damages:

(1) The claim is based on the diminution in the value of Zinc's reversionary interest in the Leases. The common law claim will be focussed upon valuation and the only breaches that matter are the breaches which have an effect on the value of the reversion. Many of the alleged breaches, such as the provision of appropriate artwork and carpets not being in optimum condition, will have no impact on value. The trial will be shortened therefore because one can ignore all breaches which have no impact on value. Further, it is no part of the Appellants' pleaded case (by which they are bound) that the turnover would increase or that the turnover rent would be triggered if the relevant covenants were complied with. Zinc cannot and do not say that an order for specific performance would result in an increase in their income-stream from the hotel. The Master was accordingly correct to say that "*it seems to be accepted and admitted by the Appellants that carrying out the works will not make any difference in terms of the rent received from their investments.*"

(2) The investment is 13 years' rent with a blue chip covenant. The income from the investment is not going to increase if the works contained in the Schedule of Breaches in question are done. The suggestion that the difference in value of the reversionary interest given the present state of the Hotels, as compared to its value had the works been carried out, could amount to £100 million is absurd. That equates to more than four times the annual rent of £26 million. It is simply unachievable. The level of damages will be a tiny fraction of that sum. The reason why Zinc have not disclosed any valuation reports is because they know the damages for the potential breaches (if any) are nowhere near the £100 million claimed for specific performance. The Deputy Master was entirely correct in describing Zinc's case for seeking specific performance as having "*an air of unreality and fictionality about it.*" Mr Wonnacott submitted that the reason why Zinc are asking for specific performance amounts to a blackmailing claim. The Administrators' Report indicates that the Hotels are not worth more the £519 million, yet they have served a pre-emption notice on Adda, offering the Hotels to Adda for £600 million. In effect, they are saying, "*Buy the Hotels for £600 million or we will pursue a claim against you requiring you to carry out works for £100 million, which won't increase the rent, but will cause massive*

disruption to your business." That approach is oppressive and confining the remedy to damages eliminates an unrealistic, oppressive claim.

(3) The third benefit is that CPR 1.4.2(c) specifically encourages the court to get rid of issues at an early stage if they are unarguable. That will reduce the scope of preparation and argument at trial. Taking Zinc's pleaded claim at its highest, assuming all the facts in its favour, it will not obtain an order for specific performance and the sooner it is struck out, the better.

43. Established authority shows that in the absence of a legitimate interest going beyond financial compensation, specific performance will not be granted. Reliance was placed by Mr Wonnacott on **Cavendish Square Holding EV v Makdessi** [2015] UKSC 67, [2015] 2 WLR 1373 at [30], where Lord Neuberger stated:

> *"More generally, the attitude of the courts, reflecting that of the Court of Chancery, is that specific performance of contractual obligations should ordinarily be refused where damages would be an adequate remedy. This is because the minimum condition for an order of specific performance is that the innocent party should have a legitimate interest extending beyond pecuniary compensation for the breach. The paradigm case is the purchase of land or certain chattels such as ships, which the law recognises as unique. Because of their uniqueness the purchaser's interest extends beyond the mere award of damages as a substitute for performance. As Lord Hoffmann put it in addressing a very similar issue "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance": **Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd** [1998] AC 1, 15.* [Emphasis added].

44. Here there is an absence of any legitimate interest, extending beyond pecuniary compensation. Moreover, given that Zinc intend to sell the Hotels before trial anyway, they cannot possibly have any legitimate interest in requiring Adda to spend £100 million carry out works. The new purchaser will acquire the benefit of the tenant's covenants and will have the right to enforce it as it sees fit. The Administrators will be left with the historic claim for any loss they have suffered. That claim can be pursued by them or assigned, but it will be an historic claim for any loss suffered at the date of sale, but that historic claim cannot be for a mandatory order. Thus, the only possible interest they can have in doing that is as a means of holding Adda to ransom, requiring them to buy out the obligation to spend £100 million for no good reason. The practical reality is that if Adda had to fight the claim as one based on specific performance of

£100 million worth of works, where the directors would be facing contempt proceedings, were an order made and not complied with, it would be fought very differently to one based on a diminution in value claim worth £2-3 million.

45. In relation to the necessary valuation exercise, Mr Wonnacott submitted that its complexity was greatly overstated by Zinc. Essentially a valuer is required to assess what adjustment a hypothetical purchaser of the Appellants' reversion would make to the hypothetical bid for the possibility that the Hotels might reach the turnover threshold if the works which the Appellants say ought to have been done had been done. This is not a difficult exercise for a valuer to carry out: that is what valuers do all the time. Zinc, having put the hotels on the market, now have real world data about what their investment is worth in its current state, and this will simplify the common law valuation exercise. Even if Zinc retained the Hotels, applying the approach in the **Arab Bank** decision to valuation, the margin of permissible error would only be 15%.

46. Even assuming, however, that the valuation exercise were as difficult as Zinc contend, that is not a reason to award specific performance in place of the usual remedy sounding in damages. He referred me to the recent decision of the Supreme Court in **Morris-Garner v One Step (Support) Ltd** [2018] UKSC 20, where at [35] Lord Reed stated: "*Damages for breach of contract are in that sense* [of the secondary obligation implied by common law to pay monetary compensation for the loss sustained as a consequence of a breach] *a substitute for performance. The court will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages... The damages awarded cannot therefore be affected by whether the breach was deliberate or self- inflicted.*" And at [37] where he said "*An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see Chitty on Contracts, 32nd ed (2015), paras 26-172 - 26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in Watson, Laidlaw at pp. 29-30 as "the exercise of a sound imagination and the practice of the broad axe*".

47. Adda submitted that the Deputy Master was correct that to conclude that:

(1) These are the types of covenants, in respect of which as a matter of practice, the Court simply does not grant specific performance at all. He was right in rejecting Zinc's submission that although the covenant is framed as a positive covenant, it is not a requirement to maintain trade which is being sought to be enforced, but the requirement to maintain trade in accordance with the Operating Standards.

(2) The remedies sought by the Appellants were not easily divisible between those which required the Respondent to achieve a result and those which required it to carry on an activity.

(3) Enforcement of the obligation would require the constant supervision of the Court, and the only enforcement mechanism would be contempt of court, which would be a wholly inappropriate method of seeking to achieve the result sought

(4) Parts of the Schedules were not specific enough for the Court to make an order for specific performance. As a result, it would have no reasonable prospect of success at trial if the Court is unable to grant such remedies.

DISCUSSION

48. Having considered the parties respective submissions, I have reached the firm conclusion that the Deputy Master's reasoning was correct, the Strike Out Order should be upheld and this appeal should be dismissed. I do so for the following reasons:

(1) I do not regard the Deputy Master as having fallen into error in his application of the principles underlying CPR Rule 3.4 or Part 24. For the reasons set out below, he was right to conclude at paragraph 53 that Zinc had no real prospects of obtaining an order of specific performance at trial and the Particulars of Claim disclose no reasonable grounds for seeking such relief. I do not accept that he applied a lesser standard than that required by either Rule 3.4 or Part 24 or that his finding in 52(12) was indicative of him apply a lower threshold.

(2) I agree with the Deputy Master that Zinc's claim for specific performance has an air of unreality and fictionality about it. Applying Lord Hobhouse's approach in the **Three Rivers** case, when considering whether there is a 'real' prospect of success, the absence of reality is the true focus, not probability.

(3) The absence of reality about Zinc's claim arises because :

(i) They have not in my judgment established, either on their pleaded case or the evidence served on their behalf, the minimum condition of "*a legitimate interest extending beyond pecuniary compensation*" as required by the **Cavendish Square** case [see paragraph 43 above];

(ii) The alleged difficulties in valuation relied upon by Zinc are more imagined than real, particularly where it is accepted by Zinc in their pleaded case that the carrying out of the works will make no difference in terms of the rent to be received from their investment in the Hotels. I find that Zinc are bound by their Part 18 response and the evidence of Mr Cohen served on their behalf, referred to in paragraphs 10 and 11 above. I accept the submission of Mr Wonnacott that in those circumstances, the suggestion that the difference in value of the reversionary interest given the present state of the Hotels, as compared to its value had the works been carried out, could amount to £100 million (which equates to more than four times the annual rent of £26 million), is unachievable. Seeking an order which requires Adda to carry out works estimated at £100 million, which far exceed the likely loss, would be inequitable.

(iii) I do not regard this as an over-complicated valuation exercise, adopting the approach outlined in the **Arab Bank** case, even with a 15% margin of permissible error [see paragraph 33 above] and the extracts from the Supreme Court decision in **One Step**, referred to at paragraph 46 above. Even if it were, that does not satisfy the necessary minimum condition of *"a legitimate interest extending beyond pecuniary compensation*".

(iv) I agree with the Deputy Master that if, as is common ground, the Court cannot grant specific performance of the principal trading obligations, then, by parity of reasoning, it cannot grant specific performance of the ancillary parts relating to the mode of trading. I do not accept the distinction drawn by Mr Reynolds between the two.

(v) In any event, even were specific performance available in principle, I accept the submissions made by Mr Wonnacott made in sub-paragraph (2)-(4) of

paragraph 47 above. Those matters would create difficulties in supervision and enforcement, "*creating oppression caused by the defendant having to do things under threat of proceedings for contempt.*" To use the words of Lord Hoffman in the **Co-operative Insurance** case at p. 13H.

(4) In my judgment, there is no real prospect of successfully persuading a Judge at trial, that it would be appropriate to make an Order for specific performance, applying the relevant legal principles. There is no other compelling reason that I can see why that issue should not be disposed of now, and should await a trial. The pleaded case discloses no reasonable grounds for a claim for specific performance. Even assuming all the facts in Zinc's favour, and looking at the claim as pleaded, I agree with the Deputy Master that damages at common law will be an adequate remedy.

49. I would add that the fact that Zinc, and now the Administrators, intend to sell their interest in the Hotels and that is likely to happen before the trial, did not, in my view, bolster my reasoning set out above. If there had been a real prospect of succeeding in a claim for specific performance, given that the purchasers would have been able to enforce the tenants' covenants in the same way, I would not have shut out that remedy on the basis of any impending sale. I preferred Mr Reynolds' submissions in that regard.

CONCLUSION

50. I therefore dismiss this Appeal. I invite the parties to agree a draft Order, which can be considered at the handing down of this Judgment.