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Case No: LM 2025 000135

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/02/2026

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THE HIGH COURT

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Between :

CM TELECOM UK LTD	**Claimant**
- and -	
RICHARD DAVID BUCK	**Defendant**

- -
- -

Mr Paul Fradley (instructed by **Macfarlanes LLP**) for the **Claimant;**
Mr James Hall (instructed by **Temple Bright LLP**) for the **Defendant**

Hearing dates: 27 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

His Honour Judge Bird:

Introduction

1. Necto Future Group Limited ("Necto") is contractually obliged to pay the Clamant around £3,014,223.32 ("the debt"). The Defendant has guaranteed payment of the debt to the Claimant. These proceedings were issued on 26 March 2025. The Defendant raises a set-off by way of defence, based on a damages claim Necto has against the Claimant.

2. The contract which gives rise to debt (described below as the APA) contains a no set-off clause at paragraph 5.1. The contract is governed by Dutch law. The relevant clause provides as follows:

> "…***All payments made by [Necto] under this Agreement will be made without deduction, set-off (verrekening), counterclaim and/or suspension (opschorting) from any cause of action howsoever arising, present or future, unless expressly provided otherwise herein.***"

3. If the clause is effective, the Defendant would have no defence to the claim. This is the Claimant's application for summary judgment on the claim or for the Defence to be struck out. The sole issue concerns the validity of clause 5.1 of the APA.

The test for summary judgment and strike out

4. The test for granting summary judgment is set out in CPR 24. Summary judgment should only be granted against a Defendant where they have no real prospect of defending the claim. To have a "real" prospect of success, the Defendant must establish something more than fanciful prospects. Mere arguability is not enough.

5. In assessing a Defendant's prospects of success the court must avoid conducting a mini-trial, but is entitled to (and where appropriate, must) take into account not only the evidence put forward by the Defendant in support of the defence, but also evidence that can reasonably be expected to be available at trial (***Royal Brompton Hospital v Hammond*** (No.5) [2001] EWCA Civ 550).

6. On the latter point (the possibility of future evidence) in ***Easyair v Opal Telecom*** [2009] EWHC 339 (Ch)) Lewison J (as he then was) said this at paragraph 15(vii):

> "*If it is possible to show by evidence that although material in the form of documents or oral evidence that would [support the respondent's case] 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….:* ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** *[2007] EWCA Civ 725*."

7. The applications for summary determination in this case (by whatever route) centre on the outcome of a question of law rather than a question of fact. In those circumstances, I bear in mind what Lewison J said in same paragraph of ***Easyair***:

> *"….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…"*

8. Mr Fradley referred me to paragraphs 66 to 70 of ***Koza Altin Isletmeleri AA v Koza Ltd*** [2025] EWHC 2304 (Ch) a decision of Thompsell J. There the learned Judge noted that if discretionary relief (such as a declaration or, as in that case, a winding up on just and equitable grounds) was sought, the court should determine the "underlying fact and matters" by reference to the summary judgment test and, if those matters were found to be present, determine whether it would be appropriate to grant the relief sought, not by reference to the summary judgment test, but as it would at trial.

The test for strike out

9. A defence may be struck out where it discloses no reasonable grounds for bringing or defending the claim, is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings, or there has been a failure to comply with a rule, practice direction or court order (see CPR 3.4).

10. In dealing with an application to strike out the court must take the content of the statement of case at risk of being struck out at its highest and may not consider extrinsic evidence. Examples of the circumstances in which a claim might be struck out are set out in CPR PD 3A. If the facts pleaded in support of a case do not disclose any legally recognisable claim, or if the claim is obviously ill-founded it would be appropriate to strike out.

Background

11. Necto arranged a tour featuring well-known musical artists. It included a concert in London at a football stadium. The Claimant operates an online platform which (amongst other things) is used to sell concert tickets.

12. On 8 July 2024, the Claimant and Necto entered into 2 contracts. Under the first ("the ticketing agreement") the Claimant would arrange for the sale of tickets and make payments ("ticket payments") to Necto in respect of those sales. Under the second contract (the advance payment agreement or "the APA"), the Claimant advanced £5m to Necto to "*finance the operating activities of the Company with regard to the events organized by Company*" ("the advance").

13. The APA envisaged that the advance would be paid by retaining ticket payments. Such sums would be set off against the advance. If, by 15 December 2024, the ticket payments were insufficient to extinguish the advance, the Claimant would be free to demand repayment, plus interest, from Necto.

14. Also on 8 July 2024, the Claimant and the Defendant entered into a deed of guarantee by which the Defendant guaranteed Necto's debt to the Claimant.

15. By 15 December 2024, no tickets had been sold and so the full amount of the advance remained outstanding. Following demand, Necto paid the Claimant £1,250,000.

16. There is some uncertainty about the total sum due from Necto to the Claimant. For the purposes of this judgment, it is not necessary for me to come to a firm view. It is however

clear that a sum of in the region of £3m is owed.

The APA and the governing law

17. The APA is governed by and to be construed in accordance with the laws of the Netherlands. The ticketing agreement and the guarantee are governed by the law of England and Wales and subject to the exclusive jurisdiction of the English courts. There is no dispute about the construction of Clause 5.1.

18. I have the benefit of evidence on Dutch law from both parties, and it was common ground that I should apply Dutch law as derived from those reports.

19. The Defendant relies on two reports from Celine van Es of the law firm *BarentsKrans* in Amsterdam. The Claimant relies on two reports from Jan van de Hel of *Stek Advocaten* of Amsterdam. The reports of both are relatively informal. The Defendant's reports are not signed and neither side's reports contains any suggestion that the authors are aware that the report will be relied upon in this (or any other) Court.

20. Despite these shortcomings I take the view that the reports must be taken as evidence of foreign law. Neither party raised any objection to the admissibility of the evidence, and I remind myself that in ***FS Nile Plaza v Brownlie*** [2022] AC 995 (SC) at paragraph.148 Lord Leggatt sets out a modern and practical approach to such issues. It is not necessary for evidence of foreign law to be introduced always by formally permitted expert evidence.

21. I take the following from the evidence of Dutch law:

    a. There is agreement on the key issues.

    b. Section 6:248(2) of the Dutch civil code "*disapplies*" a contractual provision in certain circumstances. It is cited in full for the first (and only) time in the conclusion of the second Stek report:

        > "***A rule binding upon the parties as a result of the agreement shall not apply insofar as, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness."***

    c. The threshold "*for declaring a contractual provision [unenforceable] is … very high, especially when its contractual provision is agreed upon by professional parties in a commercial contract*."

    d. The threshold requires more than an absence of reasonableness and fairness (paragraph 32 of Barent Krans' first report "BK1" and paragraph 9 of the first Stek report "Stek1").

    e. Factors that might be taken into account when assessing "unacceptability" include **"***the nature and further content of the agreement in which the clause is included, the socio-economic position and mutual relationship between the parties, the manner in which the clause came about, and the extent to which the other party (in this case: Necto) was aware of the scope of the clause*" (Barent Krans' second report "BK2" paragraph 3).

    f. The burden of establishing that a clause cannot be relied on would be on the Defendant (BK1 paragraph 33).

g. Such clauses are common in Dutch contracts (BK1 paragraph.13 and Stek1 paragraph 12(i))) and the terms of clause 5.1 are "relatively typical" (BK1 paragraph 24).

22. It appears to me that an assessment of "*unacceptability*" under Dutch law takes account of matters up to trial, as Mr Hall for the Defendant submitted. The assessment appears to be based on a wide range of factors including the position of the parties, the nature of the contract and potentially what would happen if the relevant term were enforced. Section 6:248(2) proceeds on the basis that the potentially offending provision is "binding upon the parties" but nonetheless permits disapplication of the provision. The section does not have existential consequences. It appears that a relevant provision may be relied on for some purposes but not for others.

23. The following passages from the reports (in addition to what appears from the clear wording of the section) support that view:

a. "*Whether a party can successfully invoke Section 6:248(2) DCC is circumstantial. The court assesses the concrete consequences the disputed clause in question has for the other party and will take into consideration all facts and circumstances that have occurred up to that moment.*" (BK1 paragraph 31)

b. "*…the competent court should apply Section 6:248(2) DCC with restraint… It is not a foregone conclusion that the invocation… will be unsuccessful. This must be assessed by the competent court on the basis of all circumstances of the case as brought forward by both parties*." (BK2 paragraph 2)

c. "*Section 6:248(2) DCC… 'A rule binding upon the parties as a result of the agreement shall not apply insofar as, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.' This must be assessed on the basis of all circumstances as brought forward by both parties*." (Stek1 paragraph 18(iii))

d. "*We agree with BK that only the competent court can make a binding determination on Section 6:248(2) DCC, and that it will do so on the basis of all circumstances relied upon by both parties*." (Stek 2 paragraph 9)

<u>The evidence and submissions in support of and in opposition to the summary judgment application</u>

24. Bearing in mind the limited scope of the issue before me (the validity of clause 5.1), I need only deal with the evidence as it touches on an assessment of "unacceptability" under Dutch law as I have found it to be.

25. Before dealing with the evidence, I note that I am concerned with Necto and not the Defendant. Clause 5.1 is in the APA, and the Defendant is not a party to that contract. There is no issue about the enforceability of the guarantee. Despite that, I have no direct evidence at all from Necto.

26. In summary the evidence on this point advanced by Mr Norwood on behalf of the Defendant is that:

a. Necto was a small, newly incorporated company with one director, no employees, and a modest turnover at the time the APA contract was entered into. The Claimant on the other hand was a much larger multi-national company. It follows that by reference to relative size, experience, financial strength and negotiating power, the Claimant was

in a much stronger position than Necto.

b. Necto had no Dutch law advice on the APA and had never come across a no set-off clause before and did not grasp the importance of the clause.

c. Clause 5.1 was not individually negotiated (but it was accepted that there was an opportunity to comment on the terms of the APA).

d. The impact of the clause is to require Necto to repay large sums at a time when the Claimant's own breaches made that impossible.

27. The evidence of Lois Horne for the Claimant on the same issue can be summarised as follows:

a. Clause 5.1 is expressed in the clearest of terms. It could not be clearer.

b. Similar clauses are common in contracts governed by Dutch law.

c. Both parties were commercial enterprises contracting at arm's length and with a view to making a substantial profit and as part of a coherent finance and ticketing deal.

d. Necto had access to legal advice and took it.

e. There is nothing exceptional about the clause in context and the high hurdle required in Dutch law is not met.

f. Necto acted on the clause, paying sums to the Claimant when such sums were not demanded and not asserting any right to withhold payment because of a set-off.

28. As this is an interim application the parties are entitled to rely on factual matters pleaded in their statements of case as evidence (see CPR 32.6(2)). The rejoinder (for which I granted permission at the start of the hearing) raises the following matters:

a. At the time the APA was agreed Necto's turnover had been "in the low millions" and the Claimant had a turnover of £4.75m with a net profit of £500,000. The claimant has a very substantial parent company based in the Netherlands. The group had a gross profit of in excess of €83m and more than 650 employees.

b. Necto was unaware of the importance and meaning of clause 5.1 "*having not read* [it] *in great detail*" and having had limited legal advice on it.

29. Mr Hall submitted that further relevant evidence might emerge before trial. He identified 5 possible categories of evidence:

a. The impact of not disapplying clause 5.1. This would cover for example the financial consequences for Necto of having a liability of this size.

b. Detail of the negotiations between the parties and the interactions they had before agreeing the APA.

c. The level of legal advice provided.

d. More evidence on the differences in the bargaining power of the parties.

e. What other options were open to Necto to contract with a party who was prepared to both offer ticketing services and make an advance.

30. Two points arise from the evidence, the pleadings, and the promise of future evidence: first, there is very little evidence (beyond mere comment) from the Defendant about the post agreement period. Secondly, there is no explanation as to why the evidence referred to by Mr Hall, was not available for the hearing before me.

Resolution of the applications

31. I need not set out the arguments of the parties in detail. There is a sole issue, and the arguments of each side were directed to that issue alone. There was a good deal of written argument about how I should go about determining what Dutch law was, in particular by reference to the potential application of the law of England and Wales by default or by presumption. There was also written argument on the application of the Unfair Contract Terms Act 1977 ("UCTA") and reference to a number of English authorities. These arguments have been overtaken by the concession (rightly made) that I should apply Dutch law. I have had the benefit of helpful and focussed written and oral argument from each party and I take each relevant matter into account.

32. I am satisfied that I must deal with the applications on the evidence available to me at the time of the hearing. The Defendant's submission that further evidence would assist me (see Mr Hall's 5 categories) is nothing more than a hope (or even a belief) that something may turn up. If that evidence existed, its nature and outline substance should have been provided along with an explanation that the evidence could be expected to be available at trial. In my judgment an explanation as to why the evidence was not provided before trial would also be helpful.

33. The absence of any real evidence about the impact on Necto if the clause is effective, or about what happened after the APA had been agreed is in my judgment important, and presents a very real difficulty for the Defendant.

34. In my judgment, on the evidence I have, there is no real (and in my judgment no) prospect of the Defendant establishing that clause 5.1 should be disapplied. I reach that view for these main reasons:

a. The APA is a contract between commercial bodies and part of a suite of sophisticated agreements the aim of which was to make a substantial profit for the contracting parties.

b. Whilst the parties were not of equal size or financial might, Necto was still a commercial enterprise engaged in the complex (and in my view risky) business of organising music concerts. This disparity in my judgment carries little weight. A better example of "socio-economic" disparity might be a low paid worker (an individual) contracting with his employer (a commercial enterprise).

c. Necto had the opportunity to comment on clause 5.1 and appears not to have done so. In my view it is important (as, coincidentally, it would have been if UCTA had been considered as a matter of English law) that the APA was a bespoke agreement and not one born out of "standard terms".

d. I am not persuaded that the fact that Necto had never seen a non-set off clause and was "unaware" of the existence of this clause because it had not read the APA is a factor that can assist the Defendant (or more accurately can assist Necto). The clause

is plain, and a contracting party who chooses not to read the contract he signs up to takes a risk.

35. In light of my findings, I am satisfied that the Claimant must have summary judgment on the ground that the Defendant has no real prospect of defending the claim. I am satisfied that there is no "other" reason for the matter to progress to trial. I am satisfied that a trial would be a waste of court resources and a waste of the litigants' money.

36. Having summarily dealt with the claim on the summary judgment application I need not deal with the application to strike out.

37. I do not consider this to be a ***Koza Altin*** type of case because the application of clause 5.1 is in my judgment not strictly a matter of discretion. If I am wrong, then an application of the ***Koza Altin*** approach (applying the summary judgment test to determine the underlying facts and then coming to a view on whether clause 5.1 should apply) leads to the same result.

38. I am grateful to both counsel for their assistance, economy, and industry.