Land	England
Domstol	Technology and Construction Court
Parter	Triple Point Technology Inc. mod PTT Public Company Ltd.
Dato for afgørelse	7. juni 2018
Afgørelsestype	Dom
Status	Anket. Dom i ankesag afsagt af Court of Appeal den 5. marts 2019. Ankedommen kan findes her.
Dato for publicering i domsdatabasen	4. marts 2022
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Gengivet fra	Technology and Construction Courts dombog (domskopi fra rettens hjemmeside)

Case No. HT-2015-000056

Neutral Citation Number: [2018] EWHC 1398 (TCC)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 7 June 2018

Before

The Honourable Mr Justice Fraser

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Between

TRIPLE POINT TECHNOLOGY, INC.

Claimant/Applicant

and

PTT PUBLIC COMPANY LIMITED

Defendant/Respondent

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Andrew Stafford QC and Nathaniel Barber (instructed by Kobre & Kim (UK) LLP) for the Claimant/Applicant
James Howells QC and Nicholas Maciolek (instructed by Watson Farley & Williams LLP) for the Defendant/Respondent

Hearing dates: 17 and 23 May 2018
Draft provided to parties: 30 May 2018

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JUDGMENT

Mr Justice Fraser:

1. The Claimant and Applicant, Triple Point Technology, Inc. ("Triple Point") is a company incorporated in the State of Delaware in the USA. Triple Point's business includes the design, development and implementation of software for use in commodities trading, based on its proprietary platforms (Commodity XL, or "CXL"; and Softmar Vessel Chartering and Vessel Operations, or "VO"). The Defendant, PTT Public Company Limited ("PTT"), is a public company incorporated in Thailand which undertakes such commodities trading. These two companies found themselves in dispute, the outline of which I provide below.

2. This judgment is in relation to an application by Triple Point for an injunction restraining execution of a judgment that PTT attempted to enforce in the State of Connecticut in the United States ("the US") in May 2018. A stay of execution had, prior to that date, already been ordered by the Court of Appeal in an order of Jackson LJ dated 22 February 2018. There is no dispute between the parties that the steps taken in respect of enforcement in Connecticut (by the US Marshal) should not have been taken, because the certified judgment obtained from the court in London should not have been obtained. However, there is a dispute about the terms of the order that should be granted on the injunction. As a result of the submissions advanced by PTT relating to the scope of the stay, the chronology needs to be set out in more detail than might otherwise be the case. Essentially, PTT wishes to enforce an order in its favour in respect of interest and a payment on account of costs, although it accepts that the substantive judgment sum itself cannot be enforced as it is subject to the stay of execution ordered by Jackson LJ.

3. In around 2012, PTT set about procuring a commodities trading, risk management and vessel chartering and operations system (a "CTRM" system) to replace its existing system for commodities already traded by PTT, principally oil, refined products and petrochemicals. PTT sought tenders for the design, development, supply and implementation of a new system. PTT intended there to be two phases to the project: Phase I would replace the existing system and Phase II would involve the development of the new system to accommodate new types of trade. Triple Point bid for the contract to provide this system on 7 September 2012, and provided a Technical Specification. These were then subject to a set of clarifications dated 14 December 2012 (which were subsequently incorporated into the contract). A letter of intent (which was signed by Triple Point on 10 January 2013) and a series of Order Forms (three in total, referred to as Order Forms A, B and C) were also sent to PTT by Triple Point, and a Commodity Trading and Risk Management Contract ("the CTRM Contract") was in due course signed by both parties, effective from 10 January 2013. By Article 27.1 the CTRM Contract was subject to English Law and, by Article 27.2, to the jurisdiction of the High Court of England and Wales.

4. On 16 February 2015 PTT served notice on Triple Point which required Triple Point to remedy certain breaches of contract. Those breaches were generally characterised as failing to provide adequately skilled and experienced staff to carry out the project, failing in various respects to provide the required system functionality, and failing to progress the project to complete within the contractual timescale. PTT then terminated the contract by notice dated 23 March 2015 relying on two contractual clauses entitling them to do so, alternatively at common law.

5. This characterisation was not accepted by Triple Point who sought to claim payment said to be due from PTT pursuant to certain invoices.

6. The parties' subsequent dispute, which concerned the terms of the contract, and whether there was one contract between them, or a series of contracts based on the three Order Forms, as well as the termination itself, was litigated in the Technology and Construction Court in London. There was a substantial claim by Triple Point, and counterclaim by PTT. The trial took place before Jefford J between 28 November and 15 December 2016. Closing submissions were heard on 31 January 2017.

7. Following that trial, the Judge produced a judgment dealing with the substantive issues, dated 23 August 2017. That is at [2017] EWHC 2178 (TCC). It is not necessary to examine its terms in any depth, other than to summarise that PTT was successful in the proceedings. Specific issues and findings are reproduced at [36] in this judgment. In particular, the findings in the judgment in PTT's favour, including those in relation to liquidated and ascertained damages, meant that a sum of US$4.497 million became due to PTT from Triple Point.

8. The Judge, as is often the case in a complicated case such as this one, and in particular where (as was done by Jefford J) a judgment is handed down during vacation, fixed a date for the hearing of consequential matters, and also extended time for the losing party, Triple Point, to apply for permission to appeal. This hearing took place on a day convenient for the parties and was held on 4 October 2017.

9. At that hearing, Triple Point applied to Jefford J for permission to appeal on eight separate grounds, and also generally. That application was refused, both generally and on each of the specific grounds. Costs and interest were also the subject of submissions, and had elements of contention. Triple Point conceded that it should pay PTT its costs, although the basis of any detailed assessment was contentious, as well as some other outstanding matters, including the rate of interest, and what sum should be ordered as an interim payment on account of costs. At the end of this hearing, the Judge said (and I am quoting from the transcript):
"For the avoidance of doubt, I do not make any extension of time for the making of any application to the Court of Appeal, but I observe that time should be treated as running from today since all consequential matters were adjourned until today."
That plainly meant, and in the absence of any further extension of time could only mean (and both parties correctly understood it to mean) that the 21 day period under CPR Part 52.12(2)(b) started to run from 4 October 2017. This is consistent with the notes at CPR 52.12.3 which refer to the decision of the Court of Appeal in ***Sayers v Clarke Walker*** [2002] EWCA Civ 645 and the dicta of Brooke LJ at [12] to [16]. This is that time starts to run from the decision of the lower court, and not from the date upon which the judgment or order of the court is sealed or perfected. Jefford J also reserved her decision on costs and interest, although as I have said Triple Point knew it would be ordered to pay further sums (and had conceded that it would be paying PTT's costs). The precise amount of the further sums was not however known, either to Triple Point or PTT.

10. Encouraged, if that is the correct word, by the commencement of the 21 day period, Triple Point applied to the Court of Appeal for both permission to appeal, and a stay of execution. The appellant's notice was dated 25 October 2017. That was supported by

the 1st witness statement of Mr Shirtcliff of Triple Point's solicitors, lodged with, and referred to in, the appellant's notice. In that statement, he explained at paragraph 5:
"The learned trial judge found predominantly in favour of [PTT]. The exact sum to be paid is not known at the time of preparing this statement because the learned judge has not yet ruled on contended matters of interest and payment on account of costs. However, on [PTT's] case, the amount which the judge will order [Triple Point] to pay will likely be in excess of US$5,500,000 plus over £2,100,000 on account of costs. This should include the sum of US$692,000 already paid to [PTT] at the outset of the disputed project and held by it as performance security."
Mr Shirtcliff also dealt with the difficulties of enforcing judgments against companies in Thailand, maintained that there would be difficulties in recovering payment back to Triple Point from PTT in Thailand were the appeal to be successful and a stay of execution not granted, and drew attention to the accounts available for PTT which showed it had in excess of US$6 billion in cash alone, and assets of US$66 billion.

11. The appellant's notice itself, at Section 5, in relation to the heading "please set out the order (or part of the order) you wish to appeal against" stated that Triple Point wished to appeal against the decision of Jefford J of 23 August 2017, and provided details. It also stated "The order for judgment has not been finalised at the time of preparing this Appellant's Notice." At Section 9, in response to the standard question "What are you asking the Appeal Court to do?" the box was ticked which stated "set aside the order which I am appealing." As at the date of lodging that appellant's notice, there was no order.

12. Finally, in Section 10 Triple Point made clear, by ticking the box that stated "I apply for a stay of execution" that such a stay was also being sought, as well as permission to appeal in relation to the substantive judgment. The support for the grant of a stay of execution was stated in Section 11 as being the reasons set out in Mr Shirtcliff's witness statement, and the text in that section also stated:
"and the following:
1. As a result of the judgment below, the Appellant will be ordered to pay the Respondent in the region of US $5.5m plus costs ("the Judgment Sum") to the Respondent (the exact sum will be known when the trial judge decides contested issues of interest and the payment on account of costs). Unless a stay is ordered, the Judgment Sum will be enforceable, regardless of the Appellant's pending appeal.
5. For the reasons set out above, the Appellant respectfully requests that the Court stay the enforcement of the Judgment Sum pending the determination of the appeal."
(emphasis added)

13. There was, as at the date of the appellant's notice, no decision from the Judge on the amount of costs or interest, and no order had been drawn up in respect of the US$4.497 million which had become due to PTT from Triple Point as a result of the substantive judgment. No order dealing with sums due as interest or payment on account of costs had been drawn up, nor could such an order have been drawn up, because the parties awaited the decision on those matters. That came in a judgment handed down on 17 January 2018, the neutral citation for which is [2018] EWHC 45 (TCC). In that judgment, the correct rate of interest, the basis of the detailed assessment of costs, and an interim payment on account of costs, were decided. This resulted in a further payment being ordered from Triple Point to PTT of £2.147 million on account of costs,

together with about US$700,000 in interest and other payments. The total amount was US$3.729 million when the sterling amount was converted into US dollars.

14. Thereafter two orders were made by Jefford J.
1. One dated 17 January 2018 dealing with the substantive judgment sum ("Order No.1");
2. The other, also dated 17 January 2018, dealing with interest and costs ("Order No.2").
The parties suggested two orders were drawn up, rather than the different elements being included in a single order, for reasons which do not matter.

15. The application for permission to appeal and a stay of execution was considered by Jackson LJ and granted on 22 February 2018. That order was drawn up in the following terms:
"On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal and a stay of execution
Decision:
Granted
Reasons:
This is not a straightforward case and the grounds of appeal are interlinked. The prospects of success are sufficient to warrant the grant of permission."

16. Notwithstanding this stay of execution granted by the Court of Appeal, PTT took enforcement action in the US. It did however do so only in relation to Order No.2. The argument upon which PTT relies is that the stay of execution granted by Jackson LJ was not made in respect of Order No.2, but only took effect in respect of Order No.1. Given that Order No.2 did not exist as at the date of the appellant's notice, the argument by PTT is that Jackson LJ could not have been considering either of the Orders of 17 January 2018 (even though both pre-dated his grant of permission to appeal and the stay of execution). What he was considering under the appellant's notice was the substantive judgment. Accordingly, his grant of a stay of execution can only be effective in respect of the substantive judgment sum (US$4.497 million) and not the sums due for interest or costs, as these were due under Order No.2 (which when all converted into US dollars amounts to US$3.729 million).

17. Mr Howells for PTT accepts that the Order of Jackson LJ clearly granted, on any analysis, a stay of execution of the judgment sum, contained in Order No.1.

18. What then occurred was as follows. An application was made to the court by letter by PTT's solicitors on 1 March 2018 for a certified copy of the judgment, but then withdrawn (again by letter) on 9 March 2018. An application was then made by PTT using Form 110 supported by a witness statement from Mr Prentki of PTT's solicitors dated 12 March 2018. That sought "a certified copy of the Judgment and the Order (as defined below) made on judgment entered against the Claimant herein" pursuant to CPR Part 74.12(d). It defined the judgment as that of Jefford J of 17 January 2018 in paragraph 5(iv), used the phrase "the judgment" to mean the substantive judgment of August 2017 in paragraph 9, used it again to mean the January 2018 judgment in paragraph 11, and also used a different phrase "the August Judgement" (sic) in

paragraph 12. It also used the phrase "the Judgment Sum" to mean the substantive judgment amount in paragraph 14(a).

19. Mr Howells QC, for PTT before me, accepted (as he carefully put it) that this statement could have been clearer. Certainly there was not a consistent use of the term "the judgment" throughout that statement.

20. Form 110 is entitled "Certificate for enforcement in a foreign country" and this accompanied the witness statement of Mr Prentki. It recited three different statutes, including the Foreign Judgments (Reciprocal Enforcement) Act 1933. That form defined "the Judgment" by means of seven bullet points, all dealing with interest and costs, and stated at section 10:
"That enforcement of the Judgment is not for the time being stayed or suspended, that the time available for its enforcement has not expired and that the Judgment is accordingly enforceable."
This form was dated the same date as the witness statement, namely 12 March 2018 and signed by Mr Prentki.

21. The statement that "enforcement of the Judgment is not for the time being stayed" is possibly correct if "Judgment" is interpreted as being restricted solely to the decision on interest and costs, and the order of Jackson LJ is interpreted in the way that Mr Howells seeks to have it construed, namely as only relating to one of the two orders of 17 January 2018, namely Order No.1. It is certainly not correct if that statement is taken as referring to the substantive judgment, or if the stay granted by Jackson LJ related to both of the Orders then in existence from 17 January 2018 which required Triple Point to pay sums to PTT.

22. However – and no witness evidence was submitted by PTT before me to this effect, this explanation being taken from Mr Howells' skeleton – by mistake the wrong form was used on behalf of PTT. Form 110 should not have been used as the Foreign Judgments (Reciprocal Enforcement) Act 1933 does not apply to enforcement proceedings in the US. Further, CPR Part 74.12 applies to enforcement under that 1933 Act, what is known as the Judgments Regulation (introduced by the Civil Procedure (Amendment No.7) Rules 2014 (SI 2014/2948)) and also the Lugano Convention. Neither the Judgments Regulation nor the Lugano Convention apply to enforcement of judgments in the US either. Accordingly, neither the statute nor the CPR Rule relied upon by PTT apply to enforcement in the US.

23. The Judgment on Interest and Costs, and Order No.2 dated 17 January 2018, were both certified by the court and returned to PTT's solicitors. PTT then used these to enforce through the offices of the US Marshal of the Superior Court of the State of Connecticut, who enforced the interest and costs amount in the total sum of US$4.288 million. This sum is arrived at by adding the substantial fees charged by the US Marshal of US$559,000 to the sum of approximately US$3.729 million. In the Memorandum of Support dated 17 April 2018 filed with the Judicial District of Stamford-Norwalk in the Superior Court of Connecticut PTT, as the Petitioner, explained the basis of the enforcement action and stated:
1. In footnote 1 "Enforcement of the Judgment Order has been stayed by the High Court pending appeal";

2. In footnote 2 "Under English law, the judgment for Costs, pursuant to the Costs Order, and Approved Judgment are final, conclusive and enforceable, and enforcement thereof has not been stayed by any court".

24. There are some inaccuracies in each of those statements. Firstly, even as defined by PTT, the stay that had been granted was not by the High Court, it was by the Court of Appeal. Secondly and more importantly, under English law, costs follow the event. Success by Triple Point on the appeal would mean that the judgment on costs, and the costs order itself, would of necessity and automatically be reconsidered, as would the award of interest. That is not the usual understanding of the phrase "final, conclusive". This latter point is more than an overly fine distinction. Anyone reading the Memorandum of Support, particularly someone in a jurisdiction such as the US where there is no recovery of costs inter partes, could be excused for believing that the "judgment for Costs, pursuant to the Costs Order" was final and conclusive under English law and would not be dependent upon the outcome of the appeal.

25. The total of US$4.288 million was then deducted from Triple Point's bank account at JP Morgan Chase in Connecticut by the US Marshal. The first notice that Triple Point had that this had been done was on 7 May 2018 when it received what stated, on its face, to be an execution of Interest and Costs ordered against Triple Point which was obtained in the US on 4 May 2018, following recognition of Order No.2 made by Jefford J on 17 January 2018.

26. Triple Point therefore applied to the Technology and Construction Court in London for an emergency injunction, seeking an order requiring PTT to instruct the US Marshal to suspend the execution, return the funds to Triple Point's bankers, and pointing out the impact upon its business of removal of this sum from its liquid funds. It relied heavily upon the fact that Jackson LJ had already ordered a stay of execution. It also sought to restrain any repetition of enforcement action by PTT.

27. The application for injunctive relief therefore raised two issues:
1. The propriety of the execution proceedings initiated in the US by PTT, using a certificate that should not have been obtained in reliance upon a statute and Part of the CPR that had no applicability to enforcement action in the US; and
2. The scope of the stay of execution in fact already granted by Jackson LJ.
There is a degree of overlap between the two issues because if the stay of execution already caught Order No.2, no execution could be embarked upon by PTT in any event without it being in contempt of court.

28. The application for this emergency relief was issued on 15 May 2018, served on PTT on 16 May 2018 and initially heard by me on 17 May 2018. Mr Howells conceded point 1 in [27] above shortly after he was instructed on the application, late on the evening of 16 May 2018. That point was therefore no longer in issue after that. An order was granted on 17 May 2018 requiring PTT to instruct the US Marshal to return the funds and suspend enforcement. However, point 2 remained contentious and to give the parties time to present full argument, and take full instructions, I heard that on 23 May 2018.

29. The only evidence specifically before me for the application was the 6th witness statement of Mr Shirtcliff dated 15 May 2018, although I also had the benefit of both

Mr Shirtcliff's 1st witness statement put before the Court of Appeal and that of Mr Prentki to which I have referred above. On 17 May 2018 I gave PTT the option of serving evidence for the hearing on 23 May 2018, but Mr Howells indicated that it did not wish to do so.

The enforcement proceedings commenced in Connecticut on 17 April 2018

30. So far as point 1 of [27] above was concerned, Mr Howells accepted that PTT was, as he put it, in "technical default" so far as obtaining the certified judgment was concerned. He did however wish to preserve PTT's ability to execute enforcement in the US of the sum in respect of interest and costs again, this time correctly. By correctly, I mean without relying upon the Foreign Judgments (Reciprocal Enforcement) Act 1933, which does not apply to enforcement proceedings in the US, and without relying upon CPR Part 74.12, which does not apply to enforcement of judgments in the US either. He therefore did not accept that the stay of execution granted by Jackson LJ prevented such enforcement.

31. It is unnecessary to dwell excessively upon the factual basis of point 1, but it does merit some limited comment. The court relies upon parties to provide it with clear and accurate information, particularly in witness statements from solicitors, who are officers of the court. Where a mistake is made – and nobody is infallible – an explanation is required. Such an explanation should be made in a witness statement. Regardless of that and in any event, the terms of the witness statement in support of the certification were not wholly clear in all respects. If defined terms are to be used, it makes sense for those terms to be used consistently throughout an entire statement. This is particularly so given one of the defined terms here was "judgment".

32. One matter upon which I am entirely clear, however, is that legal advisers should not blame the court staff if such mistakes occur. One point relied upon by PTT in Mr Howell's skeleton and submissions was that, in a telephone call to the court, PTT's solicitors had been told by a member of the court staff that Form 110 was the relevant form to use. Court staff are not there to give legal advice to parties, and particularly not legally qualified representatives of commercial parties in multi-million dollar disputes with parties in different jurisdictions. Enforcement overseas is a technically complex area, as those involved in this case have found, and no blame for what occurred in terms of the form used, or the basis of the application (or for that matter the contents of Mr Prentki's witness statement) can be laid at the door of the court staff.

The stay of execution granted by Jackson LJ

33. Turning to point 2 of [27] above, there are three different approaches to the matter of a stay of execution in respect of Order No.2, and they all arrive at the same conclusion, albeit by three different routes. I am asked by PTT to grant declaratory relief pursuant to CPR 40.20 under the power I have to do so by section 19 of the Senior Courts Act 1981. PTT seek a declaration, in summary, that the Order of Jackson LJ did not stay execution of Order No.2, and that payment be made by Triple Point to PTT of the sums included in that Order within 21 days.

34. I was naturally wary when asked to interpret and construe an order of the Court of Appeal, a court superior to my jurisdiction. However, in the circumstances of this case I have to do so, at least in the first instance. I have no jurisdiction to reconsider anything that is the subject of that Order. I do however have jurisdiction to decide, at first

instance, whether a particular issue is already subject to that Order. If I decide that it is, then that is the end of the matter.

35. The first of the three different approaches is to consider the Order of Jackson LJ dated 22 February 2018, and construe it on its own terms. There were two orders in fact in existence as at that date that required payment to PTT as a result of the substantive judgment of Jefford J dated 23 August 2017.

36. There were a total of 18 issues dealt with in that substantive judgment. They are listed at Appendix A to this judgment. A great many of them do not concern payment of money to PTT at all. Those that do were included in the issues at Part G, namely "Damages and Quantum", the answers to which are contained at [285] to [290] and were as follows (Triple Point being referred to as "TPT"):
"285. Issue 13 (and subject to issue no. 14):
(i) PTT is entitled to be paid the cost of procurement of an alternative system in the sum of US$10,574,756.78.
(ii) PTT is entitled to recover wasted costs in the sum of US$630,000.
(iii) PTT is entitled to recover damages under Article 5 in the sum of US$3,459,278.40
286. Issue no. 14: PTT's claim in respect of (i) and (ii) above is, however, limited by the terms of Article 12.3 to the total sum of US$1,038,000.
287. Issue no. 15: TPT is not entitled to recover at least the sum of US$2,312,361,52 in respect of services provided to PTT.
288. Issue no. 16: TPT claimed the repayment of the amount of a performance bond, provided pursuant to Article 11 and paid to PTT. TPT accepted that this issue turned on the decision as to repudiatory breach. Since I have found that PTT was not in repudiatory breach, the sum does not fall to be repaid.
289. Issue no. 17: TPT claimed to be entitled to an indemnity under Article 13 against claims by Accenture who acted as sub-consultants. Article 13 provided an indemnity against loss, damages liability and claims arising out of the performance of the Contract "provided that such losses, damages, liabilities and claims shall occur as a consequence of the errors, omissions, negligence or wilful misconduct of the indemnifying party". No such basis for an indemnity arises here and TPT are not entitled to the indemnity.
290. Under issue no. 18, PTT sought declarations as to the meaning of Articles 15.4.2 and 15.4.4. Only the declaration in respect of Article 15.4.2 was pursued. Article 15.4.2 contains an obligation to assign rights and duties to the extent required by PTT in the event of termination. PTT's case was that that must include an obligation to inform PTT of any rights and duties which PTT might require to be assigned."

37. Most judgments, and this one is no exception, containing as it did detailed findings of sums due, including a contractual cap on recovery by PTT under Issues 13(i) and (ii), as well as other money sums due and declarations, have to be distilled into orders of the court. The orders of the court that gave financial effect to these findings were Order No.1 (regarding the substantive sum) and Order No.2 (regarding interest and costs). Both of these were dated 17 January 2018 and both were in existence when Jackson LJ granted the stay of execution.

38. The stay of execution ordered by Jackson LJ is in broad terms and does not differentiate between the judgment sum itself, interest which is consequential upon the judgment sum, and costs. There is no good reason artificially to limit the ambit of the stay he granted to only one of those three payments, or only one of those two orders. In my judgment, where (as here) there is a stay granted in such wide terms, and two separate orders, each of which orders payment of money to a respondent, both of which pre-date the grant of the stay of execution pending appeal, absent clear words delineating a stay of execution to only one of those two orders, the starting point should be that payment to the respondent of such sums generally is stayed.

39. As a matter of construction, the wording of the Order of 22 February 2018 is sufficiently wide to impose a stay of execution upon payment of money sums to PTT from Triple Point as a result of PTT's success in the litigation. PTT did not have a freestanding right to interest, nor to a payment on account of its costs, independent of it being awarded the principal sum. Both of these rights are consequential upon the findings in the judgment of Jefford J dated 23 August 2017 that the principal sum was due. Triple Point was given permission to appeal those findings, and a stay of execution was granted pending the outcome of that appeal. The payment of interest is entirely secondary to the primary finding that the principal sum was due. It makes no sense to construe a general stay of execution as applying only to the obligation to pay the principal sum, yet require the necessarily consequential obligation to pay interest on that principal sum nonetheless to subsist.

40. The contents of Orders No.1 and No.2 could potentially have been included in a single order dealing with all three matters (principal sum, interest and costs). When I explored this in argument with Mr Howells, he submitted that his analysis would hold good even if there were a single order dealing with the substantive judgment amount, interest and costs. He submitted that all the order of Jackson LJ stating
"….application for permission to appeal and a stay of execution
Decision:
Granted
could mean was, absent further words, that it was payment of the substantive judgment amount alone that was stayed. This amounts to a submission that on every consideration for a stay of execution, the Lord or Lady Justice must always state on the face of the order "granted, in respect of a stay of execution for the substantive sum, and interest and payment on account of costs" or similar words, otherwise the grant of a stay of execution would not impact upon the two latter items, as they would be in different paragraphs of the relevant order. I do not accept that can be right.

41. Further, interpretation of any court order, but particularly an order of the Court of Appeal, cannot depend upon precisely what documents were before the Lord or Lady Justice making the order. Here, the order itself recites upon "consideration of the appellant's notice and accompanying documents". Pressure on judicial time is considerable. It cannot be the case that absent specific reference in a court order granting a stay of execution to a particularly identified order, a party is entitled to conclude (as PTT wish to do here) that because that order is not specifically identified, the Lord or Lady Justice did not intend to address the contents of that order.

42. Mr Howells argues that Triple Point could only, pursuant to CPR 40.8A, seek a stay of execution of an existing order or judgment, and hence the appellant's notice of 25

October 2017 could not seek a stay of the order for interest or payment on account of costs. He accepts that neither Order No.1 nor Order No.2 were in existence at the date of the appellant's notice, but argues that because the August judgment was in existence a stay could be ordered in respect of any sums due under that judgment (even though none had actually been ordered to be paid by that date), but could not be ordered in respect of interest or a payment on account of costs.

43. CPR40.8A states:
"Without prejudice to rule 83.7(1), a party against whom a judgment has been given or an order made may apply to the court for-
(a) a stay of execution of the judgment or order; or
(b) other relief;
on the grounds of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."

44. In my judgment, even if Mr Howells is right, "other relief" is plainly wide enough to include a stay of execution of both consequential interest, and an interim payment on account of costs, the payment of costs by Triple Point having been conceded before Jefford J on 4 October 2017. Triple Point knew it would be ordered to pay interest; it also knew it would be ordered to make an interim payment on account of costs. I do not accept that because the money amount of those two sums was not precisely known when the application was issued (but was known when the stay was ordered), that terms of the stay are not wide enough to encompass enforcement of interest and payment on account of costs. It should also be remembered that the application for permission to appeal had to be issued within 21 days of 4 October 2017. The procedure is that a stay of execution is sought at the same time as permission to appeal; this is made clear on Form N161 Appellant's Notice, which expressly asks the question. It is therefore the case that the application for a stay of execution had to be made before the money amount by way of interest and payment on account of costs was known.

45. In my judgment, Mr Howells' argument is excessively intricate and technically flawed. It also seeks to take unmeritorious advantage of the delay between Jefford J hearing the consequential application on 4 October 2017 and handing down her decision on interest and costs (and hence also making Order No.2) on 17 January 2018. Had both of those matters happened prior to expiry of the 21 day period for lodging the appellant's notice on 25 October 2017, there could be no argument that the Order of Jackson LJ specifically applied to Order No.2. It is only this delay that permits Mr Howells to raise the argument at all.

46. Further, parties are entitled to consider the chronology of court orders when construing orders made later in time. The stay of execution granted by Jackson LJ was made on 22 February 2018. This obviously post-dates both the orders. In my judgment, absent words in the stay of execution to the contrary, it stayed execution of both those orders made on 17 January 2018, not just one of them. It is artificial to look solely at the date on the appellant's notice, and ignore the date the stay was ordered. The arid (though potentially interesting) point of whether the court could stay execution of a payment that is known will be ordered, but the precise amount of which has not yet been calculated, does not therefore arise in this case, as it might (for example) on different facts had the stay been ordered in November 2017, and not five weeks after Order No.1 and Order No.2 were made.

47. Mr Howells also submitted that, as he put it "with respect to the Court of Appeal, the terms of the stay granted on 22 February 2018 are not entirely clear." I disagree; the order is entirely clear. The Order is in wide terms, and grants a stay of execution in those wide terms. Even if it were unclear, there is no logical reason why any lack of clarity – and I do not accept that there is any – should be interpreted in the very narrow sense contended for by Mr Howells, namely that the Order imposes a stay of execution only upon the substantive sum, but not upon a broadly similar amount by way of consequential interest and costs.

48. Therefore as a matter of construction I consider that the terms of the Order of 22 February 2018 are wide enough to impose a stay of execution of the sums awarded by way of interest and interim payment on account of costs contained in Order No.2.

49. The second of the three approaches is to construe the Order of 22 February 2018 against the appellant's notice itself. Although the decision on interest and costs had not been made as at the date of the appellant's notice, Triple Point had conceded that as costs follow the event, it would be liable for PTT's costs, although the amount of the payment on account and the basis of detailed assessment were contentious. The rate of interest was also contentious.

50. This was specifically recited in the appellant's notice. Mr Shirtcliff's 1st witness statement to the Court of Appeal stated that:
"The exact sum to be paid is not known at the time of preparing this statement because the learned judge has not yet ruled on contended matters of interest and payment on account of costs. However, on [PTT's] case, the amount which the judge will order [Triple Point] to pay will likely be in excess of US$5,500,000 plus over £2,100,000 on account of costs."
(emphasis added)

51. The figure of US$5.5 million can only be explained by taking into account interest. The figure of £2.1 million on account of costs was expressly referred to in that evidence. Further, the appellant's notice expressly requested that the Court of Appeal "stay the enforcement of the Judgment Sum pending the determination of the appeal" and had earlier expressly defined in Section 11 the Judgment Sum in the following express terms:
"As a result of the judgment below, the Appellant will be ordered to pay the Respondent in the region of US $5.5m, plus costs ("the Judgment Sum") to the Respondent (the exact sum will be known when the trial judge decides contested issues of interest and the payment on account of costs)."
(emphasis added)
Therefore interest was implicitly part of the "Judgment Sum" as defined; and costs was expressly part of the same defined term. The phrase "plus costs" is expressly included in the Judgment Sum as defined in the appellant's notice itself; an approximate figure is given to include interest; and the fact that the exact figure is not yet known is also identified.

52. Simply because neither of the orders of 17 January 2018 had been drawn up as at the date of the appellant's notice on 25 October 2017 does not, in my judgment, act to have prevented Jackson LJ from considering, or granting, a stay of execution of the

Judgment Sum as defined in the appellant's notice. If he did grant a stay of execution of the Judgment Sum as so defined, that included interest and the payment on account of costs even though the precise final sum for each of those had not been calculated as at that date. Triple Point knew these sums were going to be ordered against it, and knew (in approximate terms) the likely financial value. The Court of Appeal was told that the final figures were not available, and why, and Triple Point asked for a stay of execution anyway.

53. The logical consequence of Mr Howells' argument is that Triple Point should have lodged with the Court of Appeal either a second appellant's notice, or an amended one, dealing with the exact figures and referring specifically to Order No.2 dated 17 January 2018. I do not accept such an approach would be consistent with the overriding objective in CPR Part 1, and in any event given how "Judgment Sum" was defined in the appellant's notice, this was not necessary.

54. Further, if there were still any doubt about this, in the Grounds of Appeal that accompanied the appellant's notice the order being sought by Triple Point on the appeal was clearly stated as including:
"13.6 The costs of the trial and interest on the judgment to be determined by the Court of Appeal or remitted to Mrs Justice Jefford".

55. If it is necessary to consider the documents before Jackson LJ when he made the Order of 22 February 2018 in order properly to understand to what the stay of execution relates – and I do not consider that it is either necessary or desirable to do so – the appellant's notice and the Grounds of Appeal expressly make it clear that the costs of the trial (including the payment on account of costs) and the consequential interest on the judgment, were all the subject of the appeal and were all before the Court of Appeal from the date of the appellant's notice on 25 October 2017. The Judgment Sum was expressly defined as including costs, the interim payment on account of costs, and interest.

56. In terms of taking a step back and considering the logical outcome were Mr Howell's submissions to be correct, the consequences are notable. Even though time for lodging the appeal started to run from 4 October 2017, and even though the parties (in this or other cases) knew very substantial sums were going to be ordered to be paid to PTT, and even though the appellant's notice includes express provision for asking an appellant if they seek a stay of execution on the Form N161 by ticking Section 10 Part A "I apply for a stay of execution", the consequences of Mr Howells being correct are that no stay could be validly applied for on interest and costs unless the precise amount was known, or the actual order had been sealed or perfected. This would mean that in any case where determination of those matters took longer than 21 days, two appellant's notices would always be required. The second appellant's notice would always be required, but simply to deal with a stay of execution of sums due as interest and costs. It would also mean that the Lord and Lady Justices dealing with such matters would always have to be provided with what would be essentially duplicate (or practically duplicate) appellants' notices. I do not consider such an approach to be correct. This is, to my mind, contrary to the ethos of the CPR as a whole, and to the overriding objective, and could not be described as efficient or cost effective.

57. The third approach is to accept, for the sake of argument, that my conclusion on each of these first two routes is wrong, and approach the matter as though future enforcement action on Order No.2 was not currently the subject of the stay of execution ordered by Jackson LJ. I asked Mr Howells why, if that were the case, I should not impose a stay of execution on the payment to PTT of interest and costs. I plainly have jurisdiction under CPR Part 40.8A. I have the same material before me as Jackson LJ had before him (plus the 6th witness statement of Mr Shirtcliff), including the same evidence about the difficulty of enforcing orders against companies in Thailand and the difficulty of obtaining repayment were a stay of execution not ordered.

58. Mr Howells' answer to that was that there was no application by Triple Point to that effect. The application notice dated 15 May 2018 for the injunction sought at paragraph B:
"The Respondent be restrained from continuing or prosecuting or assisting in the prosecution of any enforcement proceedings commenced by the Respondent directed to executing upon the Orders of Mrs Justice Jefford dated 17 January 2018, until the determination of the present appeal, reference number A1/2017/2912."

59. I consider that the terms of the application notice are wide enough to include the issue of whether a stay of execution should be granted in respect of Order No.2, were that necessary because as a matter of construction, interest and costs were not already subject of the Order of 22 February 2018. In any event, Mr Howells is asking me for an order for payment of those sums by Triple Point within 21 days. There could be no prejudice to PTT to my considering whether a stay of execution should be ordered in respect of Order No.2 at this hearing, either because the Order of 22 February 2018 did not impose a stay, and/or because PTT wish to secure an order in its favour for payment of those sums.

60. Given I have the same material before me as Jackson LJ did when he was asked for a stay of execution, it may not come as a complete surprise that I would reach the same conclusion as that reached by such a distinguished Lord Justice, and conclude that in the interests of justice a stay of execution ought to be granted. Indeed, I have more material before me in this sense justifying a stay. The behaviour of PTT in relation to its attempting to enforce recovery of US$4.288 million in the US, when it knew that Jackson LJ had granted a stay of execution in the wide terms that he had that post-dated Order No.2, and the inaccuracies in the material put by PTT before both the English and US Courts to which I have referred, reinforce the conclusion that I would have reached in any event. This conclusion is that a stay of execution of Order No.2 is amply justified in this case.

61. It would also be illogical to have a stay of execution in place for the substantive sum of US$4.497 million on the grounds set out in Mr Shirtcliff's 6th witness statement, but not to adopt the same approach to the sum of US$4.288 million (or US$3.729 million excluding the fees of the US Marshal) which is consequential upon that sum, and itself a substantial amount of the same order. The fact that one sum is due under the substantive judgment, and the other is for interest and a payment on account of costs, does not make any appreciable difference.

62. There was a fourth approach, which is an argument mounted by Mr Stafford based on estoppel by convention. I found it unnecessary to trouble the parties with oral

submissions on this point. I accept Mr Howells' submissions that there is a formidable obstacle to this argument, which he describes as being fundamentally misconceived, as an estoppel requires a common assumption as to the relevant issue; ***Mears v Shoreline*** [2015] EWHC 1396 (TCC). This point does not however arise for determination. I agree with Mr Stafford that the conduct by PTT has been "opportunistic", but whether that sort of behaviour has been sufficient for an estoppel to arise will have to wait for another day (and another case).

63. In those circumstances therefore, Triple Point are entitled to the order sought in respect of future enforcement of Order No.2. I indicated this to the parties immediately upon the conclusion of the hearing on 23 May 2018, and said I would provide my detailed reasons for my decision in due course. These are those reasons.

Appendix A: The 18 issues dealt with in the substantive judgment of 23 August 2017

A. TPT's Claim To Payment of Software Licence Fees

1. Whether payment (in the aggregate sum of US$4,942,000) in respect of TPT's software was to be made on the dates set out in one Order Form dated 31 January 2013 and two dated 30 April 2013 or whether TPT was only entitled to payment under the CTRM Contract according to the milestones set out in Article 18 of the CTRM Contract.

2. If the answer to Issue 1 is that payment was to be made on the dates set out in the Order Forms, whether in any event no payment is due to TPT because, as alleged by PTT, PTT has suffered a total failure of consideration in respect of the supply of TPT's software.

3. Whether, as TPT alleges, the sum of US$330,000 in respect of annual maintenance services for software fell due and payable on 15 January 2015 (being the date stated in an order Form dated 30 April 2013) and is therefore owed to TPT.

B. The CTRM Contract

4. Whether there should be implied into the CTRM Contract:

   a. A term to the effect that TPT was required to carry out the agreed Services under the CTRM Contract only in the event that PTT made payment in respect of TPT's software on the dates indicated on the Order Forms.

   b. A term to the effect that the parties would co-operate to permit one another to perform the CTRM Contract.

C. Delay to the Project

5. Whether the delay to and/or ultimate failure of the project was caused by:

   a. On TPT's case, additional requirements for the CTRM System demanded by PTT after the conclusion of the CTRM Contract, and PTT's iterative approach to feedback which prevented TPT from completing the business process documentation in a timely manner; or

   b. On PTT's case, TPT's negligent failure to plan, programme or manage the project; its failure to provide sufficient numbers of suitably qualified staff; its negligent failure to conduct adequate business analysis and production of business blueprints required under the terms of the CTRM Contract; and/or its negligent failure to follow appropriate or internationally recognised and applied methodologies for the design, development and implementation of the software.

D. Suspension

6. Whether, on TPT's case, the parties entered into an express and/or implied agreement (whether by variation to the CTRM Contract or collateral or supplemental agreement by conduct or otherwise) to the effect that:

   a. The timeframes by which the Claimant was to provide the Implementation Services under the CTRM Contract were suspended;

   b. The Implementation Services for the CTRM Contract were subject to further negotiation and agreement; and

   c. The CTRM Contract did not therefore contain the agreed scope of the Implementation Services

E: Force Majeure

7. Whether the state of civil unrest in Thailand from November 2013 to May 2014 constituted an event of *force majeure* pursuant to Article 16 CTRM Contract such as to suspend TPT's contractual obligations during the period of unrest.

F: Termination

8. Whether TPT was in breach of contract such as to entitle PTT to terminate the CTRM Contract under its terms or at common law by reason of its negligent failure to follow appropriate or internationally recognised and applied methodologies for the design, development and implementation of the software; its negligent failure to conduct adequate business analysis and/or produce adequate business blueprints so as to address inadequacies in the functionality of the proposed CTRM system to meet PTT's requirements in respect of functional integration and/or invoicing functionality and/or interfaces between CTRM and SAP and/or reporting functionality; its failure to provide adequate staff resources and/or its negligent failure to manage the project and/or the resultant delay to the Project.

9. Whether TPT's refusal to perform the CTRM Contract from May 2014 constituted a repudiation of the CTRM Contract.

10. Whether PTT's refusal to pay licence fees or maintenance fees in respect of TPT's software on the date set out in the Order Forms amounted to a renunciation of the CTRM Contract or (on TPT's case) any separate contract(s) contained in the Order Forms.

11. Whether PTT's notices to remedy breach of 5 September 2014 and/or 16 February 2015 and/or its notice of termination of 23 March 2015 constituted repudiatory breaches of the CTRM Contract.

12. In the light of the findings made in respect of Issues 8, 9, 10 and 11, the means by which the CTRM Contract was terminated.

G: Damages & Quantum

13. Whether PTT is entitled to recover damages in respect of all or any of:

    a. The cost of maintaining its TCS System in the sum of US$1,053,075 or at all.

       I note that this claim is now withdrawn.

    b. Costs in relation to the procurement of an alternative system to be designed and developed to meet PTT's requirements in the sum of US$15,691,875 or at all; and/or

    c. costs alleged to have been wasted in the sum of US$3,080,121.21 or at all; and

    d. liquidated damages for delay under Article 5 CTRM Contract in the sum of US$3,459,278.40 or at all.

14. Whether PTT's claim to damages is limited by the terms of Article 12.3 of the CTRM Contract.

15. Whether TPT is entitled to the sum of at least US$2,312,261.52 in respect of services provided to PTT.

16. Whether TPT is entitled to repayment of the performance bond paid to PTT by cheque dated 31 January 2013 pursuant to Article 11 of the CTRM Contract in the amount of US$692,000.

17. Whether TPT is entitled to an indemnity in respect of claims by third parties such as its sub-contractor, Accenture, pursuant to Article 13 of the CTRM Contract, alternatively, pursuant to an implied right to an indemnity.

18. Whether PTT is entitled to the declarations sought as to the meaning of Article 15.4.2 and/or Article 15.4.4 of the CTRM Contract.