

Appeal No. UKEAT/0021/16/DM

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 10 November 2016

**Before**

**THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

**MR D J JENKINS OBE**

**MS N SUTCLIFFE**

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MS A HEMDAN

APPELLANT

MS ISHMAIL & MR H AL-MEGRABY

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR CHRISTOPHER MILSOM  
(of Counsel)  
Instructed by:  
Anti Trafficking & Labour Exploitation Unit  
232 Hornsey Road  
London  
N7 7LL

For the Respondents

MS GHAZALEH REZAIE  
(of Counsel)  
Instructed by:  
Messrs Hodge Jones & Allen LLP Solicitors  
180 North Gower Street  
London  
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## **SUMMARY**

### **PRACTICE AND PROCEDURE - Imposition of deposit**

1. A deposit Order was wrongly imposed in circumstances where the Employment Judge recognised that the Claimant would find it difficult to comply with its terms.
  
2. In fact it was not practically possible for the Claimant to comply with the deposit Order, which was set at so high a level in context as to impede her access to justice because she could not comply with it.
  
3. The Order imposed was not therefore a proportionate and effective means of signalling to the Claimant the low prospects of success and warning her as to costs.

**A** THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

**B** Introduction

**C** 1. This is the Judgment of all three members of this Appeal Tribunal and to which the lay  
**D** members have made a valuable contribution. It concerns an appeal from a Judgment given  
initially on 30 September 2015 and subsequently on reconsideration whereby the Appellant, (to  
whom we shall refer as the Claimant for ease of reference) was required to pay deposit Orders  
of £75 each in respect of three allegations of unlawful race discrimination as a condition of  
pursuing those allegations. Time for payment was initially directed to be within 21 days but  
was extended subsequently by the Reconsideration Judgment promulgated on 30 November  
2015 to a period of just about three months.

**E** 2. The application for permission to appeal was considered at a Preliminary Hearing by  
Langstaff J on 8 April 2016. Four grounds of appeal pursued by the Claimant were considered  
by him. In a Judgment subsequently transcribed he gave permission as follows. First, in  
relation to grounds 2 and 3 of the Notice of Appeal, which relate to over-reliance on the  
transcript of the criminal prosecution of the Respondents and/or to the question of excluding  
**F** relevant evidence or reaching a perverse decision, those grounds were permitted in relation only  
to one of the allegations, namely “restricted access to food” (see paragraph 31 of Langstaff J’s  
Judgment). Secondly, permission to pursue ground 4, which challenges the amount of the  
**G** deposit Order as being irrationally high was given. This is a challenge to quantum rather than  
as to the principle of determining that a deposit order should be made. Ground 4 was permitted  
to proceed in relation to all three allegations in respect of which the deposit Order was made,  
**H** (see paragraph 32 of Langstaff J’s Judgment). The remaining grounds were dismissed, and  
there was no appeal from that Order.

**A** 3. Notwithstanding that, it appeared at least in writing to be the case that the Claimant was  
nevertheless intent on pursuing grounds 2 and 3 in respect of all three allegations rather than as  
**B** limited to the allegation to which we have referred. However, when Mr Milsom (who appears  
pro bono on behalf of the Claimant for which we are particularly grateful) commenced his  
submissions it became clear that the appeal is pursued in line with the decision of Langstaff J.

**C** 4. Ms Rezaie, who appears on behalf of the Respondents, now concedes that the deposit  
Order made in relation to the “restricted access to food” allegation should be dismissed and no  
longer seeks to uphold that Order. We consider this to be a concession that is reasonably and  
realistically made for the reasons given by Langstaff J and one with which we entirely agree.  
**D** That Order is accordingly set aside, and the allegation in respect of “restricted access to food”  
may continue to be pursued in the proceedings without the requirement to pay any sum of  
money as a condition of pursuing it and without the risk of any costs warning in respect of it.

**E** 5. That leaves a single ground of appeal permitted to proceed (originally ground 4) for  
consideration on this appeal, and we turn to consider that now, as it relates to the two remaining  
allegations in respect of which deposit Orders of £75 each were made.

**F**

### **The Background**

**G** 6. The background facts case can be shortly summarised in light of the issue that remains  
to be determined always recognising that the facts have not yet been found. The Claimant’s  
case is that she was employed by the Respondents in circumstances she alleges amounted to  
slavery. Her case is that she was brought from Egypt to the United Kingdom by the  
**H** Respondents in May 2011 on the basis of false representations made to her about the pay,  
working hours and overall working conditions to which she would be entitled. Although a bank

A account was created for her to receive salary, it is her case that she received limited amounts  
only, and was required to work excessive and unhealthy hours, and was denied or restricted in  
B relation to her access to food. She alleges that her freedom was restricted and she was locked in  
a room or at least made to feel she could not leave the room and threatened that any attempt to  
draw attention to her position would have consequences for her family in Egypt. She alleges  
that she escaped the Respondents' clutches in October 2011 and her employment came to an  
end at that time. Her claim made in the Employment Tribunal was for automatic unfair  
C dismissal together with claims of unlawful race discrimination and breaches of the **Working  
Time Regulations** and unlawful deduction from wages.

D 7. The facts advanced by the Claimant were contested and the claims resisted by the  
Respondents. Their account of the employment relationship was very different and their  
response to the allegations of mistreatment was to fully contest the Claimant's own account.  
E There was a criminal trial involving both Respondents. The first jury acquitted the Second  
Respondent but returned a hung verdict in the First Respondent's case. A second trial took  
place and the First Respondent was acquitted of the criminal charges. These verdicts were the  
basis on which the Respondents pursued their application for deposit orders. The Employment  
F Tribunal considering deposit orders was provided with lengthy transcripts of the criminal trials  
(running to approximately 2,000 pages), and was taken to selected extracts.

G 8. The two allegations in respect of which the remaining deposit Orders were made are as  
follows: first, that after three to four weeks the Claimant was told she could no longer use the  
bedroom and so instead would have to sleep on a sofa in the living room; and secondly, that the  
H Claimant was locked in a bedroom for two days. The Employment Judge made an Order  
requiring payment of the sum of £75 in respect of each of those allegations if the Claimant

A chose to pursue them, because he concluded that they had little reasonable prospect of success.  
The Claimant contends that the decision to make an order in such a relatively high amount, was  
in error of law because the Claimant simply had no ability to pay it and the effect of the Order  
was to prevent her from accessing justice in respect of those allegations.

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### **The applicable legal principles**

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9. Rule 39 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:

“(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

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(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

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(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order -

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

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(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.”

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10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a

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**A** deposit order is to identify at an early stage claims with little prospect of success and to  
discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of  
**B** costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or  
defences with little prospect cause costs to be incurred and time to be spent by the opposing  
party which is unlikely to be necessary. They are likely to cause both wasted time and  
resource, and unnecessary anxiety. They also occupy the limited time and resource of courts  
and tribunals that would otherwise be available to other litigants and do so for limited purpose  
**C** or benefit.

**D** 11. The purpose is emphatically not, in our view, and as both parties agree, to make it  
difficult to access justice or to effect a strike out through the back door. The requirement to  
consider a party's means in determining the amount of a deposit order is inconsistent with that  
being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent  
**E** with any view that the object of a deposit order is to make it difficult for a party to pursue a  
claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the  
majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our  
collective experience.

**F** 12. The approach to making a deposit order is also not in dispute on this appeal save in  
some small respects. The test for ordering payment of a deposit order by a party is that the  
**G** party has little reasonable prospect of success in relation to a specific allegation, argument or  
response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there  
is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but  
**H** nevertheless there must be a proper basis for doubting the likelihood of a party being able to  
establish facts essential to the claim or the defence. The fact that a tribunal is required to give



**A** reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

**B** 13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

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**E** 14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been

**A** afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

**B** 15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of  
**C** success, the making of a deposit order is a matter of discretion and does not follow  
automatically. It is a power to be exercised in accordance with the overriding objective, having  
regard to all of the circumstances of the particular case. That means that regard should be had  
**D** for example, to the need for case management and for parties to focus on the real issues in the  
case. The extent to which costs are likely to be saved, and the case is likely to be allocated a  
fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a  
particular case to consider the importance of the case in the context of the wider public interest.

**E** 16. If a tribunal decides that a deposit order should be made in exercise of the discretion  
pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the  
paying party's ability to pay any deposit ordered and further requires tribunals to have regard to  
that information when deciding the amount of the deposit order. Those, accordingly, are  
mandatory relevant considerations. The fact they are mandatory considerations makes the  
**F** exercise different to that carried out when deciding whether or not to consider means and ability  
to pay at the stage of making a cost order. The difference is significant and explained, in our  
view, by timing. Deposit orders are necessarily made before the claim has been considered on  
**G** its merits and in most cases at a relatively early stage in proceedings. Such orders have the  
potential to restrict rights of access to a fair trial. Although a case is assessed as having little  
prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order  
is considered appropriate or justified does not necessarily or inevitably mean that the party will  
**H** fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does

A not operate to restrict disproportionately the fair trial rights of the paying party or to impair  
access to justice. That means that a deposit order must both pursue a legitimate aim and  
demonstrate a reasonable degree of proportionality between the means used and the aim  
B pursued (see, for example, the cases to which we were referred in writing by Mr Milsom,  
namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors  
v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following:

C “36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court  
emphasises that a restriction on access to a court is only compatible with Article 6(1) if it  
pursues a legitimate aim and if there is a reasonable degree of proportionality between the  
means used and the aim pursued.

D 37. In particular, bearing in mind the principle that the Convention is intended to guarantee  
not rights that are theoretical or illusory but rights that are practical and effective, the Court  
reiterates that the amount of the fees, assessed in the light of the particular circumstances of a  
given case, including the applicant’s ability to pay them and the phase of the proceedings at  
which that restriction has been imposed, are factors which are material in determining  
whether or not a person enjoyed his or her right of access to a court or whether, on account of  
the amount of fees payable, the very essence of the right of access to a court has been impaired  
...

E 42. Having regard to the circumstances of the case, and particularly to the fact that this  
restriction was imposed at an initial stage of the proceedings, the Court considers that it was  
disproportionate and thus impaired the very essence of the right of access to a court ...”

F 17. An order to pay a deposit must accordingly be one that is capable of being complied  
with. A party without the means or ability to pay should not therefore be ordered to pay a sum  
he or she is unlikely to be able to raise. The proportionality exercise must be carried out in  
G relation to a single deposit order or, where such is imposed, a series of deposit orders. If a  
deposit order is set at a level at which the paying party cannot afford to pay it, the order will  
operate to impair access to justice. The position, accordingly, is very different to the position  
that applies where a case has been heard and determined on its merits or struck out because it  
has no reasonable prospects of success, when the parties have had access to a fair trial and the  
tribunal is engaged in determining whether costs should be ordered.

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**A** The Appeal

18. Against that background we turn now to consider the deposit Order Judgments in this case. The Preliminary Hearing to consider the deposit order application took place on 14 and 15 September 2015. The Employment Judge concluded that the three specific allegations had little reasonable prospect of success and made the deposit Orders to which we have referred. The Employment Judge made it clear that he took account of the Claimant's means but observed that she had not attended the hearing and could not be cross-examined in relation to those (paragraph 14). He referred to her witness statement, in which she described the fact that she had been recognised by the Home Office, the competent authority, as a victim of trafficking and to her limited financial resources. She stated that she was receiving Employment Support Allowance of a little over £125 per week and that from this she was required to cover all expenses including rent, food and travel. She stated that if required to comply with a deposit order she would not be able to continue with her claim or, by inference, the specific allegations to which any deposit order attached. At paragraphs 15 and 16 the Employment Judge held as follows:

**F** **"15. I was invited to infer that the sum of £125.05 per week would not leave her with any disposable income after she has paid rent, food and travel, but it is a pity that I was not supplied with any information in that respect. I was also provided with medical evidence about the claimant in the form of a report prepared by Dr Juliette Cohen in July 2013, so the report was somewhat out of date. In her conclusions, Dr Cohen said that the claimant's mood was low but her behaviour was normal. She has no biological symptoms of depression. She has no current thoughts of self-harm or suicide. She had developed neck and shoulder pain and has developed some symptoms of depression with low mood, social withdrawal, lack of motivation and inability to find pleasure in anything. She would benefit from treatment for those symptoms.**

**G** **16. I accept that the claimant has a low income. My original intention was to order that the claimant pay £150.00 in respect of each allegation that she wished to pursue, of the three identified in this order. Having heard Mr Milsom's submissions, I modified that to £75.00 in respect of each allegation. I accept that these will be difficult sums for the claimant to find, but that is the purpose of the deposit order. The claimant should understand that the tribunal has taken a certain view about the strength of certain of her allegations. She is at risk if she pursues them, in terms of costs. I do not pretend that it would be easy for the claimant to pay those deposits, but if she feels strongly that she can sustain the allegations, then she will wish to find the money to pay the deposits in order to pursue them. The fixing of the level of deposit is intended to help the claimant to understand the view that has been taken of the strength of these allegations. Justice would not be served, it seems to me, by ordering the deposits to be nominal sums, such as £20, as Mr Milsom submitted would be appropriate."**

A 19. Subsequently, following reconsideration a Reconsideration Judgment was promulgated,  
which superseded to some extent the conclusions earlier reached. Importantly, in the  
Reconsideration Judgment the Employment Judge was able to refer to additional evidence  
B about expenditure the Claimant was required to cover from her Employment Support  
Allowance. At paragraph 9, for example, he said:

C “9. The claimant did present a witness statement on 15 October. In her statement she said  
that she was unable to afford to pay the total deposit of £225 and would be in real financial  
difficulty if she was required to do so. She said that she is unable to work because of poor  
health. She has had treatment, she said, for mental health issues. She has also had  
D gynaecological problems. She is solely, she says, reliant on the sum she receives by way of  
Employment Support Allowance. She said that she spends between £30 and £60 per week  
travelling to appointments with her solicitors, her GP and the hospital. Until August she was  
paying about £60 per week for English lessons. She says that she pays between £30 and £40  
per week on food and £15 per month on her mobile phone, which is her only means of staying  
in contact with those who support her. She now pays, she says, £74 every two weeks for her  
accommodation.”

D 20. Further, at paragraph 12 he said:

E “12. I am asked to accept an unsworn statement from the claimant as to her financial means.  
I have still not had any explanation from the claimant as to why she did not attend the hearing  
before me, so that she could be asked about her financial situation. If I accept this evidence, as  
I think I must, then the conclusion I must draw is that her outgoings vary between £100.46  
and £140.46 per week. She is no longer paying for English lessons. In a week when her  
outgoings do not exceed £100.46, the claimant has some spare income.”

F 21. His conclusion at paragraph 15 repeated what he had said earlier, as follows:

G “15. ... the claimant is entitled to decide if she wishes to pursue all of the allegations in respect  
of which deposit orders were made, or only some of them, or none. I do not think that the  
interests of justice are served by reducing the deposits to such a small amount that it is an  
amount that the claimant can comfortably afford. That is not the purpose of a deposit order.  
I do not think that it is an inappropriate use of the power to make a deposit order, to order a  
party to pay a sum which they would find difficult, but not impossible to pay. I will allow the  
claimant until 29 February, 2016 to pay the deposit orders but I do not vary the amount of  
them.”

H 22. Mr Milsom, in clear and helpful submissions, emphasises that this Claimant is a victim  
of trafficking and somebody to whom the **Council of Europe Convention on Action against  
Trafficking in Human Beings** (which entered into force for the UK on 1 April 2009)  
accordingly applies. Article 12 provides that contracting parties must adopt legislative or other

**A** measures necessary to assist victims in their physical, psychological and social recovery. It provides that such assistance is required as a minimum to include:

“standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance”

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23. Article 15 also requires that victims are to have access to compensation from perpetrators of human trafficking, and in this case both counsel agree that Employment Tribunal proceedings are one of the means, albeit not the sole means, for affording access to justice and to such compensation. Mr Milsom submits, accordingly, that if a deposit order diverts sums provided to ensure subsistence for a victim of human trafficking that will not further the aims of the **Convention** and, moreover, it will render ineffective or impossible to exercise rights to access a fair trial or compensation. He contends that the Employment Judge fundamentally misunderstood the purpose of a deposit order both generally and having regard to the particular facts and circumstances of this case, and the level at which the order was made was accordingly in error of law, and should have been set at zero. He recognises, however, in making that last submission that the appeal and the permission that he was given to pursue the appeal is directed at the quantum of the deposit order only.

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24. Ms Rezaie, in able and clear submissions, strove valiantly at the outset to uphold the Employment Judge’s remaining deposit orders but was ultimately driven to concede that the effect of requiring the Claimant to find £225 within a period of three months was to require her to find a sum she was not likely to be able to raise and was accordingly an error of law. In her submission, however, it is not open to the Appeal Tribunal to reduce the deposit Order to zero in circumstances where the appeal was framed as a challenge to quantum of the deposit Order, because that would in effect overturn the deposit Order altogether. Nevertheless, in a frank and realistic concession she accepts it would be disproportionate for the matter to have to return to

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**A** the Employment Tribunal and consents on behalf of her clients to the Appeal Tribunal  
exercising discretion afresh as to the amount of deposit order to make. Furthermore, she  
concedes that this is a case where a nominal deposit order is the only order that can properly be  
**B** made, having regard to the Claimant's situation and significantly limited means. She submits  
that such an order would achieve the second purpose to which deposit orders are directed,  
namely to act as a warning in respect of costs.

**C** 25. We regard it as an important consideration that the Claimant is a victim of trafficking  
and required to be provided for by way of financial support so as to ensure her subsistence.  
Given her very limited means and that essential consideration, we have concluded that the  
**D** deposit Order made by the Employment Judge was not realistically capable of being complied  
and was accordingly not a proportionate and effective means of achieving its purpose of  
signalling to the Claimant the assessment of little reasonable prospects of success and warning  
**E** her as to costs. This deposit was not a sum of money she was likely to be able to raise in the  
period available, or indeed, in our judgment, in any period, and was set at so high a level in  
context as to impede her access to justice. The Employment Judge was wrong to describe the  
intended purpose of the Order as to make it difficult for the paying party to find the sum  
**F** payable. That was to misunderstand the purpose of a deposit order.

**G** 26. The deposit Order must accordingly be set aside, and fresh consideration given to the  
appropriate amount to be ordered. We do not accept Mr Milson's submission that it is open to  
us in circumstances where the Employment Judge determined that a deposit Order should be  
made to set it at the level of zero and in effect to overturn it. However, a proportionate deposit  
**H** Order in this case could not have been more than a nominal sum in respect of each allegation,  
and accordingly we substitute for the Orders made deposit Orders in respect of the two

**A** remaining allegations of £1 each. Although these are nominal amounts, the warning in respect of costs that is one of the consequences of a deposit Order will continue to have effect and force in relation to the two allegations if the sums are paid and the allegations are pursued but ultimately fail.

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27. The appeal is therefore allowed. The deposit Orders are set aside and replaced by the Orders to which we have referred.

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