Neutral Citation Number: [2021] EWHC 874 (Ch)

Case No: CH-2020-000216

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT (ChD)
ON APPEAL FROM Deputy ICC Judge Baister
IN THE MATTER OF MELARS GROUP LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 13/04/2021

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

MELARS GROUP LIMITED

Appellant

- and –

EAST-WEST LOGISTICS LLP

Respondent

- -
- -

MR JAMES SHEEHAN and MR STEPHEN DONNELLY (instructed by **Withers LLP**) for the **Appellant**
MR EDWARD KNIGHT and MR OWEN CURRY (instructed by **Fortior Law**) for the **Respondent**

Hearing date: 29 March 2021; further written submissions: 29 and 30 March 2021

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Approved Judgment

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

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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Mr Justice Adam Johnson :

Introduction

1. This is an application for relief from sanction made by the Appellant company, Melars Group Limited ("*MGL*").

2. MGL was ordered to be wound up by order of Deputy ICC Judge Baister dated 4 August 2020. It then sought to appeal the winding-up order. The Petitioner, East-West Logistics LLP ("*EWL*") sought an order for security for costs of the prospective appeal. The security for costs application was compromised and Roth J. made a consent order on 18 November 2020 containing the following terms:

> *"1. Unless by 4pm on 3 December 2020 the Appellant:*
>
> *(1) pays £30,000 into court by way of security for the Respondent's costs of the appeal; and*
>
> *(2) pays the Respondent's costs of the application as set out at paragraph 2.*
>
> *then:*
>
> *(a) the appeal is dismissed without further order; and*
>
> *(b) the Appellant shall pay the Respondent's costs of the appeal, to be assessed in detail if not agreed.*
>
> *2. The Appellant shall pay the Respondent's costs of the Application, in the sum of £12,000*."

3. Paragraphs 1(2) and 2 of Roth J's order were duly complied with, i.e. MGL paid the costs of the application. However, paragraph 1(1) was not complied with, i.e., MGL did not pay the £30,000 security by 4pm on 3 December 2020. The consequence of that, absent any relief from sanction, is that MGL's appeal stands dismissed. MGL contends it is entitled to relief and that its appeal should be restored.

Background

4. There is a lengthy history of litigation between the parties, but for present purposes, the background may be briefly stated.

5. EWL originally obtained a default judgment against MGL in the BVI in November 2015. That judgment was later set aside on conditions, but then a further BVI judgment was entered against MGL in June 2016 after it failed to file a defence.

6. MGL was wound up on the basis of the judgment debt arising from this second BVI judgment. The Petition was presented in July 2016, but then stayed in August 2017 to allow the MGL to seek to set aside the judgment. It seems however that that the intended challenge dissolved and was never pursued (or not effectively pursued).

7. MGL originally had its registered office in the BVI, but in December 2015, shortly after the original BVI judgment, the registered office was moved to Malta. When the winding-up Petition came to be heard in this jurisdiction, the principal issue was as to MGL's centre of main interests or COMI. The Deputy Judge eventually concluded that the COMI was in England & Wales, despite MGL's registered office being in Malta, although he reached that conclusion "*by a narrow margin and with misgivings*." The Deputy Judge himself gave permission to appeal.

8. I was given some information about related proceedings between the present and associated parties. It is unnecessary to set this out in detail, but it is relevant to note that the proceedings include a criminal complaint in Switzerland against EWL and others, initiated by MGL in October 2012. Following the making of the winding-up order and the appointment of Joint Liquidators by the English Court, steps have been taken by the Joint Liquidators to withdraw the Swiss complaint. It is a matter of dispute between the parties whether that withdrawal is effective.

9. I have already mentioned the order made by Roth J on 18 November 2020. As regards compliance with paragraph 1(1) of that Order, the position is as follows (this account includes reference to certain contemporaneous documents produced during the course of the hearing before me, which I permitted the parties to make further submissions on after the hearing).

10. On 23 November 2020, a representative of MGL wrote to their then solicitors, Preiskel & Co, to ask whether Preiskel could provide an invoice for the sum of both the costs amount and the security for costs amount arising from Roth J's order. That was because MGL wished to pay the funds to its solicitors as a first step, "*as shareholder did not want to wire funds directly from his personal account*."

11. An email chain on 26 November then shows steps being taken by Preiskel & Co to action this request, and on the same day an invoice was raised and sent by email to MGL for the total amount of £42,000.

12. There is then a SWIFT message dated the following day, 27 November 2020, showing MGL (or someone on its behalf) actioning a payment to Preiskel & Co's client account in the sum of £42,000.

13. The funds were not in fact received by Preiskel & Co. until 2 December 2020. MGL's evidence was that this was longer than usual. In any event, 2 December was the day before the date set for compliance with Roth J's order.

14. On the same day, i.e. 2 December 2020, the costs amount due under Roth J's order (£12,000) was duly paid, and Preiskel & Co. lodged a payment form and a copy of the Roth J's order with the Court Funds Office ("*CFO*") by email. However, when inquiries were made about actually making the required payment of the security amount, Preiskel & Co. were told that it would need to be made by BACS transfer and that the necessary details would need to be obtained by email. An email was duly sent, but an automated response received saying that a substantive reply might take up to 5 days because of the Covid-19 pandemic.

15. Preiskel & Co. then wrote to EWL's solicitors asking for forbearance but there was no immediate reply. On 3 December, Preiskel & Co. contacted the CFO again and

attempted to make payment on time but were told that would not be possible because of a backlog of BACS requests and reduced staff at the office. The 4pm deadline therefore came and went and no payment was made. EWL's solicitors wrote thereafter to say that the appeal should be treated as having been dismissed, and on 4 December asked for the hearing date for the appeal (which by then had been fixed for a date in January 2021) to be vacated.

16. Preiskel & Co. solicitors wrote to the court with an apology on 4 December 2020, explaining that the partner and associate and MGL's then counsel were all suffering from COVID-19. The present application for relief was issued on 7 December 2020, and included an undertaking by Preiskel & Co. that the sum it had received in respect of the security amount (i.e. £30,000) would be held by it pending further order of the court.

17. The CFO confirmed the necessary payment details a week later, on 14 December 2020. Payment was made by Preiskel & Co. on 16 December 2020, and the CFO eventually confirmed receipt only on 30 December 2020.

Relevant Principles

18. The parties were agreed on the principles to be applied, which were summarised in *Denton v TH White* [2014] 1 WLR 3926 by Lord Dyson MR and Vos LJ at [24] and are well known:

> *"A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions, and orders]'."*

Discussion & Conclusions

Stage 1

19. Looking at the first stage of the Denton analysis, I have come to the view that the breach here was a serious and significant one.

20. In expressing that conclusion, I have borne in mind in particular the direction given at paragraphs [26]-[27] of Denton, which seems to me to require an evaluation of the breach on its own terms, regardless of the attempts by the defaulting party to ensure compliance or the reasons for non-compliance. As it seems to me, such matters fall to be evaluated in the second part of the analysis.

21. I reach the view that the breach here was serious and significant for the following reasons:

    a. Roth J.'s order required payment into court to be effected by 4pm on 3 December 2020. Payment was not in fact made until 16 December, almost two weeks later. On any view that is a substantial delay. (I should say here that I do not accept the primary submission made by Mr Knight on behalf of EWL, that there was compliance with Roth J's order only on 30 December 2020, when the CFO wrote with its final confirmation. The order required MGL "*to pay £30,000 into court by way of security*", and in my judgment that direction was complied with on 16 December when the funds were transferred).

    b. I am not persuaded that it makes any difference at this part of the analysis to say, as Mr Sheehan for MGL suggested, that from 7 December onwards EWL was effectively secured by means of the undertaking given by Preiskel LLP. It may have been, but (i) the undertaking was given only two working days after the deadline for compliance, and (ii) was not in fact what Roth J's order demanded by way of compliance. It was offered by way of substitute compliance only.

    c. Self-evidently, non-compliance had serious consequences. The pending appeal was automatically dismissed. That enabled EWL to communicate with the court and to vacate the hearing then scheduled for January 2021. Thus, there was just the sort of disruptive effect on the conduct of ongoing litigation referenced in Denton at [26]. Moreover, I do not think it is open to MGL to be critical of EWL for taking steps to vacate the hearing. The need to do so followed inevitably from the automatic dismissal of the appeal. Once that happened, absent further order from the court, there was no need for a hearing. Roth J's order was in that sense intended to be self-executing. EWL did no more than seek to give effect to that practical reality. I do not think it should be criticised for doing so.

Stage 2

22. I then come to the second stage of the Denton analysis. This requires me to examine the reasons for non-compliance. The position is as follows:

    a. There was an initial period of 3 working days before MGL wrote with its request for an invoice on 23 November 2020.

    b. The requested invoice was supplied by Preiskel & Co on 26 November, 3 working days later. It was only on the morning of 26 November that Mr Dougans wrote to his accounts department asking for the requested invoice to be issued.

    c. Thereafter, MGL moved swiftly, and gave its instruction for the payment to be made on the following day, 27 November.

    d. That was almost a week (and effectively 4 working days) prior to the deadline in Roth J's order. However, the funds did not arrive in Preiskel & Co's bank

account until 2 December, 1 working day before the deadline. I have no direct evidence as to the reasons for that delay, but at least part of it seems to have been the result of the banking process taking longer than expected.

e. Thereafter, the delay between 2 December and 16 December was the product of resourcing difficulties and a backlog of work within the CFO. One can see that because Preiskel & Co. made contact with the CFO straightaway on 2 December and indeed took all steps they were able to pending provision by the CFO of the BACS details needed in order to be able to make payment. Had those details been provided, then no doubt payment would have been made immediately; but they were not provided until 14 December, with the result that payment was not actually made until 16 December, when Preiskel & Co.'s internal checks had been made.

23. Standing back, there are therefore a number of overlapping reasons why the required payment was not made in time, but perhaps one main reason. The overlapping reasons include the time taken within the banking system for the funds to be transmitted to Preiskel & Co.'s client account (which accounts for the period between 27 November and 2 December), together with a slow response from the CFO in providing the necessary BACS information (which accounts for the period between 2 and 14 December 2020). But they also include the fact that the required invoice was not raised until 26 November 2020, a matter that was entirely within the control of MGL and its solicitors.

24. It seems to me that main reason, however, is this: although no-one thought it at the time, the 14 day period for compliance with Roth J's order was unreasonably short to begin with. The longest single period of delay in the overall process was the 12 days it took for the CFO to provide the required BACS payment details (i.e., the period between 2 and 14 December 2020). If, as seems to be the case, that was typical of the CFO's turnaround time at that point, then compliance would only have been possible had those details been requested at around the time the order was originally made (i.e., 18 November 2020), or at any rate very shortly thereafter. I do not think it unreasonable of MGL not to have done so, because even allowing for the pandemic, it seems to me Preiskel & Co. were entitled to assume that such information would be made available reasonably promptly upon request. As it turns out, however, that was not the case, with the consequence that the order was likely incapable of being complied with more or less from the point in time that it was made.

Stage 3

25. Looking at Stage 3 of the analysis, I have come to the conclusion that relief from sanction is justified, notwithstanding my earlier conclusion (at Stage 1) that the breach was a serious and significant one. That is for the following reasons.

26. First, it seems to me that on balance satisfactory efforts were made to comply with Roth J's order. Certain steps in the process were perhaps slower than they might have been, but there is no evidence of prevarication about complying. Efforts were ongoing to ensure compliance from 23 November onwards. The instruction was given for payment by SWIFT on 27 November, and in my view it was reasonable for those involved at the time to assume that that would allow the deadline to be met.

27. Second, and relatedly, there is the point already made above in discussing Stage 2, i.e. that as matters have turned out, the agreed timetable was likely never a realistic one. That was no-one's fault, in the sense that it reflected an understandable but, in the event, inaccurate assessment of how long the process of dealing with the CFO would take to deal with. In Mitchell v. News Group Newspapers Ltd [2013] EWCA Civ. 1537, in describing what might amount to good reasons for non-compliance with a missed deadline, the Court of Appeal at para. [41] said that *"[l]ater developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal*." The present may not be quite the situation the Court of Appeal in Mitchell had in mind, but even if not, it is closely analogous, and the sentiment expressed is applicable for the reasons I have already given: it is unfair I think to be critical of a party for failing to meet a deadline which was always unlikely to be met anyway, whatever steps had been taken to comply with it.

28. Third, I agree that in this part of the analysis, even if not before, it is significant that the relevant funds were in Preiskel & Co.'s account before the deadline on 3 December 2020 (with instructions to pay them over to the CFO), and that by 7 December 2020, Preiskel & Co. had given an undertaking to hold the funds to the Court's order and an application was made for relief. Thus, although certainly there was non-compliance with Roth J's order, nonetheless it is clear that efforts *were* made to procure compliance, and when it became clear that compliance would not be achieved, steps were taken promptly to plug the resulting gap in a practical way and thus to provide security for EWL. All of that is consistent with a genuine desire to comply rather than (for example) a desire to try and avoid the effect of the order or prevarication about whether to comply or not. The delay in making the application for relief only on 7 December 2020 is excusable on the basis that the solicitors and counsel involved were, by 4 December, all suffering symptomatically from Covid-19.

29. Fourth, there is the fact that the refusal of relief would have serious consequences for MGL and would effectively be terminal, at least as far as the position in this jurisdiction is concerned and possibly elsewhere (including in Switzerland in light of the steps taken by the English Liquidators in relation to the Swiss criminal complaint: see [8] above). That is a matter of significance in particular given the hesitancy expressed by the Deputy Judge in stating his finding on the key COMI issue and the fact that he himself gave permission to appeal (see above at [7]). Against that, Mr Knight made a number of points about the overall merits of MGL's position. These included the fact that (as he put it) MGL remains hopelessly insolvent and will be liquidated either in this jurisdiction or another. He pointed also to examples of MGL's conduct both before and after the hearing of the Petition (including the moving of its registered office to Malta shortly after the original BVI judgment, the fact that having obtained a stay of the Petition the promised challenge to the second BVI judgment was not pursued, and the fact that the former directors of MGL have failed to co-operate with the English Liquidators). I see the force of those points, but I am not persuaded that they tilt the balance in favour of denying relief. They all amount to saying, in effect, that MGL and those standing behind it are unmeritorious litigants whose practice is to obfuscate and cause trouble, and so the best thing to do is to use the opportunity presented by their default to cut off any prospect of them creating further problems by means of their intended appeal. With respect, it seems to

me that is not the proper approach to take. For one thing, it ignores the fact that the appeal raises at least an arguable point. For another, it is not really practical for me on the present application to form such a broad assessment of where the respective merits of the parties lie. The present litigation is one part only of a web of claims the parties and their associates are involved in arising out of the same subject matter. As Mr Sheehan said during his submissions, even attempting a high level summary is a bold endeavour. It is not safe, I think, for me to inform my judgment on the present application by reference to an attempted assessment of which party overall is the more meritorious and deserving. I am concerned with the much narrower question whether, having regard to the facts immediately relevant to MGL's appeal, it is right that that appeal should be allowed to continue, notwithstanding MGL's failure to comply with the deadline in Roth J's order. In my judgment, it should.

Conclusion

30. For all the reasons given above, I have determined that I will accede to MGL's application for relief from sanction. I would ask counsel please to liaise with a view to drawing up an order to reflect the outcome of this Judgment.