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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No. 2015-00756

Commercial Court
Rolls Building
7 Rolls Buildings
Fetter Lane
London

Thursday, 6th April 2017

Before:

MR. JUSTICE ANDREW BAKER

Between:

CATALYST MANAGERIAL SERVICES

Claimant

-v-

LIBYA AFRICA INVESTMENT

Defendant

Counsel for the Claimant: MR. COURTENAY BARKLEM
Instructed by Dallas & Co Solicitors, Oxon, RG9 2BH

Counsel for the Defendant: MR. ISAACS QC

JUDGMENT APPROVED BY THE COURT

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1. MR. JUSTICE ANDREW BAKER: There are two applications before the court today. The first in time is an application by the defendant by application notice dated 24th March 2017. That seeks an order for the release of funds currently held in court and for the discharge of interim third party debt orders.

2. The longer-term background to that application is that at an earlier stage in these proceedings, there had been a summary judgment of Master Kay QC which was set aside ultimately by consent on terms encouraged by Mr Justice Burton when an appeal against the summary judgment came before him, which terms included the retention in court of funds that had been brought into court by that time.

3. There is a further complexity to the way in which those funds were provided relating to the position of the defendant, and its need for special permission because of the existence of UK and EU sanctions, so that originally funds were provided by an affiliated company and then, pursuant to an order of the court, substituted by funds provided by the defendant itself.

4. The interim third party debt orders were orders obtained by the claimant as first steps towards enforcing the summary judgment which was, as I have described, later set aside.

5. The shorter term, or immediate, background to the defendant's application is that the claim now stands struck out as a result of the claimant's failure to comply with an unless order of Mr Justice Teare requiring that security for costs which had been ordered to be provided be provided by 4.30 pm on 31st March, failing which the action would be struck out.

6. The logic of the defendant's application is simply that the claim now having been struck out, there is no basis for the continued retention by the court of funds held on account of the possible future success of the claimant on the claim at a trial, nor is there any basis for any future application to render the interim third party debt orders final; they ought to be discharged.

7. That essential logic is agreed by Mr Barklem, who has appeared today for the claimant, subject, he says, to any consideration that may need to be given to how the position should be managed if there is any possibility of these matters going further – that is to say to the Court of Appeal.

8. The later application in time is the claimant's application moved by Mr Barklem by application notice dated 28th March 2017. That is an application to set aside the order of Mr Justice Teare dated 6th February 2017 by which the claimant was originally ordered to provide security for costs, and that the claimant have relief from sanctions, namely the striking out of its claim; thus an application to restore the claim to life with, what is more, an application that the trial date be maintained.

9. In that latter respect, in fact, the trial listing has been vacated and was vacated prior to the issuance of the defendant's application. Therefore, in reality, it is in that regard an application to re-fix the matter, for trial in May. for part, but not all, of the original trial listing. I say part of that listing only because it appears now to be agreed on both sides that the defendant is correct in its view that as a result of certain developments I do not need to describe in detail as to the scope and quantum of claims, a two-week trial would be sufficient, all things being equal.

10. The background to the case as a whole I need describe only in very general terms. The claimant pursued a claim for something of the order of $15 million it says to be unpaid fees pursuant to a management development team services agreement of April 2009.

11. Without doing justice to all of the detail in the case, the defendant's primary response is that that agreement was superseded by a later agreement, which itself was further superseded by yet a further agreement and that, in late August 2010, there was ultimately signed a settlement agreement resolving all matters between the parties on terms that included a payment of just over $1 million by the defendant to the claimant in addition to sums previously paid, such that no further claim could arise.

12. The claimant's position in relation to that is not, as I understand it, to challenge as such the settlement agreement, but to argue that it did not have effect to settle all potential claims in relation to the prior agreement said by the defendant to have superseded the original management development team services agreement. The claimant also says, if it needs to, that such an agreement was procured by duress so as to be avoidable or unenforceable.

13. There is one yet further agreement relied on by the claimant in response to the settlement agreement and reliance upon it by the defendant. It was purportedly entered into some weeks before the settlement agreement. By it, so the claimant says, the management development team services agreement was, in some sense, reactivated, or confirmed to be reactivated or still operative notwithstanding the later agreements. That further agreement signed purportedly on behalf of the defendant by Mr Mohammed Shushan, who, it is common ground, did, for at least some period or periods of time, work for the defendant.

14. The defendant, however, says that he was not in any way employed by, or entitled to represent, them in August 2010, that the alleged reactivation agreement, as they have labelled it, is therefore a sham and a dishonest document, and indeed that leads to their having joined, with permission granted by Mr Justice Blair in the case, both Mr Shushan and Mr Qureshi, the principal behind the claimant, as part 20 defendants.

15. The original security for costs order of February of Mr Justice Teare records the defendant's undertaking not to pursue that part 20 claim, or any counterclaim against the defendant, if the proceedings came to be struck out for want of provision of security for costs.

16. The application for security for costs has itself a long history. It had been intimated from much earlier in the proceedings, was issued in December 2015, but did not come before the court substantively before October of last year (2016) when the case was before Mr Justice Blair, who dealt with the joinder I just described of Mr Shushan and Mr Qureshi.

17. There was not time on that hearing to deal with the application. Mr Justice Blair made some passing comments about it, but also at the end of his short ruling on the joinder application made clear that there would be a very real concern as regards the provision of security for costs if there was to be any question of the proceedings – that is to say the claimant's claim – being ultimately stayed or struck out, for want of provision of security, and yet the defendant be free to pursue the individuals. That, as I understand it, was the immediate and obvious catalyst for the undertaking given to the court to withdraw any counterclaim if there be a default in the provision of security and the claim be subsequently struck out.

18. The application for security for costs finally came on to be dealt with by Mr Justice Teare on 6th February 2017. The claimant's position for that application had throughout been, amongst other things, that this was one of those cases where security ought not to be ordered as it would stifle the meritorious claim of an impecunious claimant for it to be required to provide that security.

19. On the eve of the hearing, a skeleton argument was lodged on behalf of the claimant which opened with a note to the court referring to a letter from Dechert's, the claimant's then solicitors, stating that it had not been possible to lodge the skeleton argument any earlier because funding had only just been agreed, and that the then availability of litigation funding fundamentally changed the claimant's position such that it could no longer maintain that requiring security to be provided would stifle the action. As a result, the claimant did not, in the end, oppose an order for security for costs. Security for costs was ordered and it was ordered to be provided in the form of payment of $1.75 million into Dechert's client account to be held to the order of the court, written notification of all of that to be provided to the defendant by 4.30 pm on 20th February 2017 – that is to say two weeks later.

20. Security was not provided as ordered, as I shall explain. It is said that circumstances changed and indeed the claimant had laboured under a misapprehension as to its own position in adopting the stance it adopted at the hearing on 6th February. The defendant therefore applied to have the claim struck out, or alternatively to have unless order terms imposed bearing in mind the imminence of the trial listed to commence on the first day of term after the Easter break – that is to say 25th April. That application, which is central to the consideration of the matter today, came before Mr Justice Teare on 10th March 2017.

21. The claimant's position as submitted in their fully-argued 16-page skeleton argument by Mr Willem, then appearing as counsel for the claimant, was, amongst other things, that because the funding the claimant had understood to be available in February was not in fact available, because it was impecunious, and because its claim ought not to be stifled: firstly, on any view the claim should not be struck out there and then; but also, secondly, the court should not move to impose unless terms – in other words, it should not impose sanctions – but instead should, at worst for the claimant, stay proceedings to give it a substantial and general further opportunity to provide security for costs.

22. Although that was the position developed, as I have indicated, in detail and at length by way of the skeleton argument, Mr Qureshi, as effective principal of the claimant, had, in his witness evidence for that hearing, both explained what was said to be the change of circumstance since the hearing in February and set out at length what was said to be the evidence demonstrating the claimant's impecuniosity and its difficulties in obtaining funding, but went on to state:

> "CMS accept that its claim will be struck out if it cannot obtain funding and provide security for costs in a short period of time from now."

23. In reality therefore, entirely unsurprisingly, the focus of the hearing before Mr Justice Teare on 10th March was how much of a further opportunity should be provided before, if the claimant failed to provide security within that further time, it would be right for the claim to be struck out and how, if at all, in the circumstances the trial date could be maintained.

24. The order made on that hearing was one requiring that security for costs be provided either by way of cash payment, as previously ordered, or by the provision of a first class bank guarantee, or by the claimant showing that it had obtained ATE insurance cover for not less than $1.75 million in respect of its prospective liability in costs to the defendant in reasonably satisfactory form for the purposes, that is to say to stand as security for costs. The order was that unless that was done by 4.30 pm on 21st March, the claimant's claim be struck out.

25. A detailed and careful timetable was provided under which if the claimant proposed to provide security via an ATE insurance policy, that was to be shown to the defendant in draft and the matter was to come back to court for resolution of any issue as to its being or not reasonably satisfactory for the purpose.

26. The order went on to provide, with unless order strike out sanctions, for certain procedural steps that would need to be taken. In particular, the provision by the claimant of its witness evidence and expert evidence or confirmation that it would not be relying on expert evidence if the trial was to be maintained and effective. The claimant did not comply with the unless order terms as to the provision of security. The claim was struck out automatically by operation of Mr Justice Teare's order immediately after 4.30 pm on 21st March.

27. However, that occurred not without further consideration of the matter, not once but twice. The claimant did seek to comply by proffering ATE insurance. It was unsatisfactory for what, in this context, have become entirely predictable reasons, namely that it did not satisfactorily provide to the defendant either a direct right of claim on the policy, in circumstances where the claimant itself was asserting its own impecuniosity, and it did not provide the defendant with an unconditional assurance or something close enough to unconditional to be satisfactory in the context, because of the potential for the insurers to be entitled to raise defences, including defences of avoidance for misrepresentation or nondisclosure, matters over which the defendant had had, and would have, no control. Mr Justice Teare ruled in those circumstances, entirely unsurprisingly it seems to me, that the ATE policy provided in draft was not in a reasonably satisfactory form.

28. On 17th March, as anticipated by the order of 10th March, he provided the claimant with one further opportunity to comply, organising as effectively his order on that hearing a further hearing for the afternoon of Monday, 20th March if the claimant was then in a position to proffer an amended draft with a view to meeting the court's concerns. A further draft policy was so proffered. It did not answer the concerns. Mr Justice Teare therefore, on that fourth hearing (in all) on Monday, 20th March, ordered and declared that the amended draft was also not in reasonably satisfactory form.

29. Against all of that background, the grounds then of the claimant's application are that:

(1) there has been a material change in the claimant's circumstances which provided the grounds of the order dated 6th February 2017 sufficient that it ought to be set aside;

(2) if the claimant's claim is struck out, that will stifle a meritorious claim which will cause serious injustice.

30. It seems to me, as I anticipate the application notice accepted or intended, that those grounds are cumulative; the claimant must be correct on both. The alleged material change in the claimant's circumstance, as I have already indicated, is the suggestion that

whereas on 6th February when the matter was first considered by Mr Justice Teare, there was funding in place to enable the claimant to provide security, that was not in fact the position as matters transpired.

31. The evidence as to that provided by the claimant is wholly unsatisfactory. Apart from bare assertion on the part of Mr Qureshi in his statement of 3rd March 2017, what the court has seen is an email at 10.58 pm on Friday, 3rd February 2017 indicating that at that point there was an unsigned proposed funding agreement in relation to which Dechert's were able to confirm that they were in funds, although in what amount I have no idea, but on behalf of the proposed funder (whose identity has been redacted), not on behalf of the claimant.

32. It is asserted on instruction by Mr Barklem that Mr Qureshi in fact signed that agreement on 3rd February 2017, but not only, as I say, is that not in evidence, nor is it in evidence that his signature of its own would be sufficient to create a concluded agreement when that would not mean that it had been signed by on behalf of the funder, whoever that was. Even if it had become, so far as it went, a concluded contract, it is apparent from the email that it was subject to conditions precedent that would require to be fulfilled. I have no possible ability to judge, as the claimant asserts to have been the position, that by reference therefore to matters as they stood on 3rd February, it was in possession of a funding arrangement available to satisfy the order made on the Monday following for the provision of security for costs in cash.

33. In those circumstances, I could not find, and do not find, that the claimant has shown to the court that its circumstances as regards its funding had actually changed at any time after 6th February, before any of the hearings before Mr Justice Teare, or for that matter (apart from one point I will come to at the end) before the hearing before me today.

34. However, and although as I have said material change in the claimant's circumstances is the ground of application invoked by the application notice, Mr Barklem draws to my attention the decision of the Court of Appeal in *Tibbles v SIG PLC 2012 EWCA Civ 518*. The Court of Appeal concluded that a misstatement as to the circumstances made to the court can also provide, in principle, a sufficient basis for an application under CPR 3.17, which this application is, to set aside an order previously made.

35. It follows says Mr Barklem, and I see the logic of this, that if the court does not find that the circumstances in truth changed after 6th February, that indicates that they were misstated to the court by, ultimately, leading and junior counsel for the claimant, whose names are on the skeleton argument to which I referred, in which it was said that funding was then in place, no doubt as they were instructed, sufficient to render the claimant able to meet a security for costs order.

36. In circumstances where, for the reasons I have given, the finding that there was not in truth any material change in the claimant's circumstances flows from the unsatisfactory evidence the claimant has chosen to provide to the court with its application, it does not seem to me appropriate to allow it to finesse the application to one of misstatement by counsel, on the face of things on instructions from the claimant, as to the position. I can only say that from the email to which I have already referred – that being the only material I have been provided by reference to which to judge the matter properly – the claimant could not reasonably have understood that it had unqualified access to funding so as to be able to give that reassurance to the court. In those circumstances, the misstatement of the position to the court, if that is the way in which the matter were to

be analysed, is not something which would, in the circumstances of this case, justify, in my judgment, a reconsideration of the grant of the order of security in the first place.

37. More importantly than any of that, however, even if there were, which I have not been able to find, a material change of circumstance, or if I allowed the application to be put on the basis of a material misstatement of the circumstances to the court on 6th February 2017, all of that – that is to say what the claimant now says to be the true position – was both before the court on each of the three occasions when the matter came back before it, and it was before the court by reason of being ventilated in detail by Mr Qureshi, in his statement, and relied upon by the then counsel for the defendant in support of such submissions as were made as to what action the court should then take.

38. Furthermore, I have already noted that in the light of all of that matter Mr Qureshi, on behalf of the claimant, explicitly accepted the time had come for an unless order and that the claim needed to be struck out, and was bound to be legitimately and properly struck out, if the claimant could not provide satisfactory security for costs in short order in the, as it is now said to me new and changed circumstances, but nonetheless in the circumstances as they then obtained as of 10th March.

39. This is therefore not a normal set aside case, nor a normal relief from sanctions case. Subject to one point I have mentioned already in passing and said I would need to come back to, nothing has happened that, in my judgment, is any different in kind or degree to that which was in terms anticipated and considered by the court when the orders imposing and then on two occasions confirming the sanction of striking out the claim were made and indeed in which circumstances, as I have indicated, the imposition and confirmation of that sanction was openly offered and accepted as appropriate by the now applicant for relief.

40. I do not regard it as necessary or appropriate in those circumstances to give the claimant, as it were, the benefit of the full *Denton v TH White Ltd [2014] 1 WLR 3926* principles for relief from sanctions. *Denton* is most known as favourable to applicants for relief in the sense that it drew back from the perceived strictness of the description of the principles in the now infamous previous decision of the Court of Appeal in *Mitchell v Newsgroup Newspapers Ltd [2014] 1 WLR 795*. That is not the sense in which I mean that the claimant here will be favoured by applying *Denton*, and I am certainly not taking this case back to *Mitchell*. What I mean is that whilst potentially tough to satisfy, for example because of the emphasis in modern times on the importance and public interest in time and in compliance with procedural rules, *Denton* does ultimately involve a balancing exercise.

41. In the present case, however, in my judgment, there is no call for a balancing exercise, unless there has been some change in circumstance affecting the claimant material to the appropriateness of the imposition of the sanction, since it was imposed by Mr Justice Teare last month in the circumstances that I have indicated.

42. Under the practice in the Commercial Court, which may differ from that in other parts of the High Court, orders for security for costs are normally not expressed to carry any sanction. In particular, they do not ordinarily provide for the striking out of the claim on default or even typically a stay of proceedings, when first made. If there is default, if application is then made, the issue of sanctions is given specific and careful consideration. In front of all that, the claimant is in a position to put in any evidence it may wish to, to explain why it has defaulted, whether and if so when it might comply if given more time, and the impact upon it of imposing sanctions, in particular the sanction

of striking out the claim, if there is not compliance within any further stipulated deadline.

43. Where the upshot of all of that is that further time is given on unless terms with striking out for default or with any other sanction imposed, in my judgment it is not open to the claimant to return to this court after defaulting and seek to argue that the sanction should not apply, in the absence of any change of circumstance material to the appropriateness of applying that sanction from the circumstances before the court when the sanction was imposed by that order. The fact of default upon a basis anticipated to be possible when the sanction was ordered to apply cannot, in my judgment, be a relevant change of circumstance. Subject to the point I have now mentioned twice, that seems to me to be sufficient to dispose of the claimant's application and, all things being equal, it ought therefore to be dismissed, with the defendant's application to be allowed in principle in consequence, subject, it may be as I said at the outset, to any discussion as to whether that should have immediate effect if I am told there is any possibility of an appeal.

44. Turning briefly then to the second part of the grounds for the application, it is said that the original order of 6th February should be set aside because the court ought to have understood, had it not been told at the last minute that funding was in place which meant the matter was not given full consideration, that this was a case where an order for security would stifle a meritorious claim.

45. Obviously, as things now stand, the order for security, or rather the unless order made in March, has stifled the claim because it does stand struck out. That is obviously not the sense in which the ground is raised. Rather, as I have indicated, the suggestion is that it would have made a material difference to the consideration of the court as to the appropriateness of the grant of security to have understood that funding was not then in place. I disagree. Whilst for that reason, and because of what the court was told about that, it may be the matter was not given as much attention in argument as it might have been if it had been the primary issue, Mr Justice Teare made clear findings upon argument as to that aspect of the application on 6th February. He found that the claimant's evidence had not descended to the level of particularity required to enable the court to make any stifling the claim finding. That was, I emphasise, not merely passing observation unnecessary to the decision Mr Justice Teare was making on that occasion, but was the central reason for his finding that the application for security had not been reasonably defended in the first place by the claimant, which then directed his order that the claimant should pay, as it was ordered to pay, the entirety of the costs of the original application. For that reason also, the application to set aside the 6th February order, in my judgment, fails.

46. Before finally coming back to the one new wrinkle – and it is a very new wrinkle that I have now mentioned in passing three times – I should make clear that, subject to that wrinkle, in my judgment approaching the matter by reference to the *Denton v TH White Ltd [2014] 1 WLR 3926* principles would not result in a different outcome.

47. Firstly, it seems to me that the breach of the order for provision of security is serious. It was an order originally made in early February for provision of security by 20th February, in respect of which further time ultimately through 21st March 2017 was given. The claimant says that was quite a tight timescale but that in turn was because of the importance of the imminence of the trial and although the claimant says that it did engage in substantial efforts to meet that deadline, in my judgment it was an amount of

time overall that was more than sufficient for a claimant able to meet the order to ensure that it did so.

48. Furthermore, I reject the submission of Mr Barklem that the seriousness of the breach is to be judged only by reference to the degree of fault on the part of the party in default (here the claimant) in failing to meet the order, without reference to its consequences. Here, the consequences are fundamental. It seems to me, again contrary to the submission of Mr Barklem, that it is quite unrealistic, even if the trial hearing itself now only needed to be two weeks rather than three weeks, to suppose that reviving the claim today could fairly to the defendant lead to a trial next term. In those circumstances, precisely in part justifying the imposition of the sanction by way of unless order terms in the first place, the failure to provide security, as ordered by the time ordered, has the consequence, unless the claim stands struck out as it presently does, of delaying this matter for yet another whole year or thereabouts, requiring the defendant to have no finality, to have the claim still hanging over it, and to continue to litigate without being secured in respect of those costs.

49. As regards the reasons for the default, essentially Mr Barklem' submission, although he developed some variations on the theme that in my judgment added nothing to the basic point, was that the time to provide the security was ultimately quite tight. The claimant was not quite able to achieve it in time, but it came quite close.

50. It seems to me that, as I have already stated, the amount of time overall between 6th February and 21st March 2017 was sufficient for the claimant, if it were really able to do so, to obtain any necessary funding and provide compliance with the order. In the circumstances, I am not persuaded that there is a good reason for the noncompliance.

51. The wider circumstances that must then be considered, as it seems to me, include in particular these: the claim is already very old; there are real concerns, to my mind, over the frankness with which the court has been apprised of the claimant's circumstances and the efforts it has made in relation to its funding – even now the evidence it has provided as regards the position, both historically and now, is far from satisfactory; on the other hand, it is said that this is a potentially meritorious claim, or rather it was prior to being struck out, and in my judgment, even taking account of the various matters raised by Mr Isaacs in his very helpful skeleton argument, I do not think I would be in any position to say that the merits appear, on first acquaintance, to have been so tenuous, or weak, that the loss of the ability to pursue the claim should not be weighed in the balance to at least some real degree. In all the circumstances, and balancing those factors, it does not seem to me that the claimant would have made out a case for relief from sanctions. That would not, in my judgment, have been the just order in all of the circumstances.

52. I finally now return to the one very new matter to which I have adverted in passing a number of times. In a rather extraordinary development, I was provided just before coming into court with a two-page, but apart from formalities effectively one-sentence, sixth statement of Ms Dallas, now the solicitor for the claimant, which says:

> "I have been informed this morning that the claimant has secured funding for the future costs of the case from a UK-based funder and an ATE policy up to £1.7 million."

Because of the coincidence of figures between that and the $1.75 million being the amount of the security ordered, I did clarify that that was correctly expressed as in pounds sterling, and I was told that it was.

53. If he needs it – which he does, since otherwise the claimant's application stands to fail for the reasons I have already indicated – Mr Barklem seeks an adjournment. That would be an adjournment to evidence properly, if it can be, that entirely insufficient statement, as to a new circumstance for the purpose it would be of asserting that that does constitute a material change of circumstance from the position as it is obtained before Mr Justice Teare, namely the involvement of a new funder and an ability finally to meet the security for costs obligation.

54. It seems to me that, in short, as Mr Isaacs QC put it for the defendant in resisting an adjournment, this is simply far too little and far too late. Put more analytically – that is not to belittle that way of putting the point on Mr Isaacs' part – the obtaining now some two weeks and two days after the unless order deadline of an ability to fund is not something that is different to the circumstance of the case present before the court when the unless order was considered and imposed. That is simply a provision, or rather an ability asserted, to provide security that comes too late to satisfy the order.

55. Furthermore, it seems to me that the very significant prejudice that would result from the matter now going off until something like a year from now would remain sufficient as to mean that an application for relief from sanctions by reference to whatever lies behind that one sentence would have no real prospect of success.

56. I also have to say – and I do not mean this as any criticism of Ms Dallas personally – that against all of the known background, and against what they will have seen, in particular from Mr Isaacs' skeleton argument, as to how the application today was to be resisted, it provides the court with no real basis for concluding that, if put to further and better evidence on the point, the claimant will in fact provide satisfactory evidence showing that it might now provide security satisfactory to the defendant, or to the court, that the claimant has offered today that thoroughly uninformative, unattributed single sentence.

57. In all those circumstances, it seems to me, as I say, that Mr Isaacs is quite right to describe that as far too little, far too late, an insufficient basis to warrant an adjournment and therefore not a basis upon which to resist the logic of my other conclusions. The logic of those other conclusions is that the claimant's application should be dismissed and the defendant's application should be allowed. Subject to any discussion about the possibility of any appeal, that will be the order I make.

(End of judgment)

(Discussions followed as to costs)
