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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2019] EWHC 3295 (ChD)



No. HC-2010-000018

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 22 November 2019

Before:

MR JUSTICE MORGAN

B E T W E E N :

GLOBAL ENERGY HORIZONS CORPORATION

Claimant

- and -

ROBERT GRESHAM GRAY

Defendant

MR A. WOOLNOUGH (instructed by Eversheds Sutherland) appeared on behalf of the Claimant.

MS L. NEWTON (instructed by Enyo Law) appeared on behalf of the Defendant

J U D G M E N T

MR JUSTICE MORGAN:

1 This is an application by the claimant, Global Energy Horizons Corporation, to extend certain time limits in an order originally made by Arnold LJ, sitting at first instance, on 4 October 2019. There was a previous extension of the relevant time limits by an order which I made on 11 November 2019.

2 The litigation has a long history. It has involved disappointment for both sides of the litigation and it has cost a very substantial sum of money for both sides. I need not, for today's purposes, go into that history. I can take the matter up with the order made by Arnold LJ on 4 October 2019. The relevant parts of that order are paras.7, 8, 9 and 10. Paragraph 7 ordered the claimant to pay the defendant's costs of the valuation phase on the standard basis, such costs to be assessed if not agreed. The defendant, whom I have not yet named, is a Mr Gray. Paragraph 7 of the order defines what is meant by the "valuation phase". I need not go to that definition for today's purposes. Paragraph 8 of the order directed that the claimant was to pay 75 per cent of the defendant's costs of the consequential hearing subject to a specific exclusion, again, on the standard basis, to be assessed if not agreed. Paragraph 9 of the order directed the claimant to make a payment on account of the defendant's costs in para.7 of the order in the sum of £1,624,357 within 21 days, that is by 4.00 p.m. on Friday, 25 October 2019. Paragraph 10 of the order is in these terms:

"Unless the payment set out in para.9 is made in full on the date it falls due, the claimant shall, no later than seven days thereafter, disclose to the defendant the identity of any third party which has funded its claims, or any part of its claims, in these proceedings, including their addresses and contact details and the amounts and full terms of the funding which has been provided."

3 I have been shown the relevant part of the transcript of the hearing before Arnold LJ, which discussed the suitability of an order in those terms. It is clear from para.10 that the obligation to disclose the information there referred to is conditional; it depends on whether the payment in accordance with para.9 is made on the specified date.

4 Since that order was made, there has been evidence filed on behalf of the claimant referring to discussions which the claimant is having with funders. It is fair to say that the claimant has revealed some information but has also not said everything which it could say as to what is happening. The claimant would wish to conduct negotiations with funders in its own way and it is reluctant to be wholly transparent with the defendant, Mr Gray, as to what precisely is going on.

5 Suffice to say that the claimant is having difficulties in raising the £1.6 million in order to make the payment on account pursuant to para.9 of the order. The claimant failed to make that payment by the specified time on 25 October 2019. On 11 November 2019, I extended the time to 4.00 p.m. on 15 November 2019. The claimant failed to make that payment. Also on 11 November 2019, I continued the regime created by para.10 of the earlier order and I extended the time for compliance with para.10. The claimant now seeks a further extension of 21 days in which to make the on account payment.

6 The parties have been able to agree a certain amount about the outcome of this application. They have agreed three things, but I think they disagree on a fourth. They have agreed first

that the time for making the relevant payment should be extended to 4.00 p.m. on 6 December 2019. That is an extension of three weeks from the earlier date, or about two weeks from today.

- 7 They have also agreed that the date referred to in para.10 of the earlier order is not to be seven days after 6 December 2019. Indeed, it is not to be after 6 December at all, it is to be advanced to 4.00 p.m. on 25 November 2019, that is Monday next. That is to meet a request by Mr Gray's side that he should have this information sooner rather than later so he can take preparatory steps to use the information after 6 December 2019, particularly if he does not receive the £1.6 million on 6 December 2019.
- 8 The third thing that is agreed is that Mr Gray agrees that he will not use the information given to him pursuant to para.10 before 6 December 2019. Mr Gray will wait to see if he gets paid on 6 December. If he does not get paid on 6 December, no-one suggests there should be any inhibition on him using the information after 6 December.
- 9 But now comes the point. The claimant says that if Mr Gray is paid on or before 6 December, then he must not thereafter use the information provided to him. So, in particular, Mr Gray would not be free to use the information to write to the funder and tell the funder that the £1.6 million payment does not end the matter and that the funder who has funded the litigation hitherto may be called upon to pay the costs ordered pursuant to para.7 and 8 of the earlier order. I do not know how much those costs will be, but it may very well be the case that the costs outstanding following assessment, even where £1.6 million has been paid, will be something of the order of another £1.6 million. So, on the restriction requested by the claimant, after 6 December 2019, if £1.6 million were paid, Mr Gray would not be free to contact the funders and say, "There is quite a lot of further money due and Mr Gray reserves the right to pursue the funders for that money."
- 10 I start by considering whether there is a legitimate benefit to Mr Gray of being able to use the information after 6 December even where he has been paid £1.6 million prior to 6 December. It is clear to me that there is a legitimate benefit to Mr Gray in having and using that information. As I understand it, the claimant's case has been funded by funders. As I understand the case law, although I am not deciding anything, Mr Gray may have a strong case for saying that the funders should pay Mr Gray's costs to the extent he has had orders for those costs, if it turns out the claimant does not pay the costs.
- 11 It is also right that the timing of a claim being made against the funders may be material. It is, on the face of it, desirable for Mr Gray to make his claim on the funders sooner rather than later, lest it be said by the funders that there has been delay which should count against Mr Gray in due course. So there is a legitimate benefit to Mr Gray of being free of the restriction the claimant seeks.
- 12 The other matter I ask myself is what is the prejudice to the claimant if I do not impose the restriction they seek. There seems to be an expectation on the claimant's side that if Mr Gray's solicitors write to the funders that is going to make it more difficult for the claimant to get funding. I can see that that is a possibility, although my own assessment is that the difficulty that would be created by such a communication is very much overstated and overemphasised. The reality of the matter is that the claimant is going to have to tell the funders itself of the problems it has, of its liability to Mr Gray, of the real possibility that Mr Gray will be entitled to claim his costs from past funders but not from future funders, as far as I can see, so that the difference between the claimant telling the funders that and Mr Gray's solicitors telling the funders that is not obvious. It may be that Mr Gray's solicitors

will write in aggressive terms, whereas the claimants would say to the funders something more bland, but in many ways it is only proper for the funders to know what they might be in for and if aggressive applications by Mr Gray is what they will be in for it is only fair to them for them to know that. So, I am not persuaded that the prejudice to the claimant is such that the court should step in, impose a restriction which takes from Mr Gray what I have regarded as a legitimate benefit.

- 13 I have also considered whether making an order today without the restrictions sought by the claimant is somehow moving the goalposts compared with the order made by Arnold LJ. His order was conditional and so this question of Mr Gray being paid £1.6 million and having information which could be used to contact funders would not arise. Whereas what is happening at this stage is that because the claimant has got into difficulties with payment and has had to come to court for an extension of time, there is an opportunity for Mr Gray to obtain an order that is not conditional in the way in which the earlier order was. I am not persuaded by that consideration to take a different course from the one I think is justified. The way the case was argued before Arnold LJ assumed conditionality. Today, the matter has been looked at afresh and one has looked in far more detail at the question of the benefit and the prejudice to the rival parties. Having looked at it afresh, I am not persuaded I should impose the restriction on the use of the information after 6 December 2019.
- 14 Accordingly, I will make the order with the three elements I have referred to as agreed. I will not place a restriction on the use of the information after 6 December 2019.
- 15 For completeness, I refer to a submission made in reply by counsel for the claimant that instead of Mr Gray's solicitors writing to the funders the claimant should write to the funders and the claimant's letter could be perhaps discussed, partially drafted and approved by the court and/or Mr Gray. It seems to me that that refinement is not appropriate. I am not persuaded that the restriction is needed, so I will not impose it.

L A T E R

- 16 This is not a case where summary assessment ought to engage with the number of telephone calls, the number of emails, the number of letters. I have read the material that has been placed before me, I have seen the correspondence, I have seen the skeleton arguments. I know what was at stake. The costs on both sides have been extremely high. I will not say surprisingly high, because I have stopped being surprised. But I am assessing costs on the standard basis. One of the things I must reflect is proportionality. These costs are very disproportionate. A proportionate sum is £5,000 for the defendant's costs. So, that is the figure at which I will summarily assess the defendant's costs.

CERTIFICATE

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This transcript has been approved by the Judge