Neutral Citation Number: [2022] EWHC 604 (Ch)

Case No: BL-2019-000708

BUSINESS AND PROPERTY COURT
Chancery Division

Rolls Building
Fetter Lane
London, EC4A 1NL

17 March 2022

Before :

MR NICHOLAS THOMPSELL

sitting as a Deputy Judge of the High Court

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Between :

ZUMAX NIGERIA LIMITED	**Claimant**
- and –	
FIRST CITY MONUMENT BANK PLC	**Defendant**

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- -

Mr Jikoa Monu as McKenzie friend for the Claimant
Ms Poonam Melwani QC and Mr Paul Henton
(instructed by Preston Turnbull LLP) for the Defendant

Hearing date: 16 March 2022

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JUDGMENT

- -

Mr Nicholas Thompsell:

INTRODUCTION

1. This decision relates to the latest stage in a long-running dispute between Zumax Nigeria Limited ("**Zumax**" or the "**Claimant**") and First City Monument Bank plc (the "**Bank**" or the "**Defendant**").

2. The dispute relates to facts that were also the subject of an earlier action (which I will call the "**2013 Claim**") under Case Number HC-2013-000590. The claim concerned ten identified bank transfers received by a predecessor bank to the Bank. The transfers were intended to be for the account of the Claimant but the Claimant alleges that it has never received value for these amounts.

3. The circumstances involved are explained at length in the decision of Miles J (the "**2020 Judgment**") in relation to the 2013 Claim, reported at [2020] EWHC 1852 (Ch) (which, in turn, incorporates an earlier description of the factual background from the judgment of Newey LJ reported at [2019] EWCA Civ 294). I will not try to better the description provided by the learned judges.

4. The current action (which I will call the "**2019 Claim**") relates to the same facts. It was made by the Claimant on a precautionary basis in 2019. The Claimant had lost in the Court of Appeal in relation one of the original causes of action (based on the existence of trusts over the sums in question). As a result, the Claimant had been seeking to amend its particulars of claim in the 2013 Claim to include new causes of action. The Claimant was concerned that it might find certain of its proposed extended causes of action would have become time-barred by the time its proposed amendments were agreed by the court and the 2019 Claim was lodged to ameliorate this risk.

5. As the current action was made on this precautionary basis, both parties agreed that it should be stayed. It was stayed by a consent order dated 6 November 2019 pending any further order or agreement to lift the stay.

6. The 2020 Judgement ordered the striking out of the 2013 Claim unless Zumax repaid to the Bank certain amounts (in excess of £3 million) in compliance with an order of the Court of Appeal made on 13 March 2019 (the "**CA Order**") consequent upon the reversal on appeal of Zumax's originally successful claim. Zumax paid only a small fraction of the amount ordered. As a result, the order made by Miles J took effect so that the 2013 Claim was struck out.

7. The Defendant now wishes to bring an application for the 2019 Claim to be struck out. It wants an opportunity to argue that it to allow the 2019 Claim to continue after the 2013 Claim has been struck out for failure of the Claimant to comply with orders of the court, amounts to an abuse of process.

THE CIRCUMSTANCES OF THE HEARING

8. The hearing was conducted remotely via Teams. This was a late change in the arrangements brought about because I had tested positive for the coronavirus a

few days earlier. Whilst I was experiencing no ill effects, I did not wish to risk infecting anyone else. I extend my thanks to the parties and to counsel for cooperating with this change of plans.

9. At the hearing the Defendant was ably represented by Ms Poonam Melwani QC and by Mr Paul Henton. The Claimant had not secured legal representation, but requested that I allow Mr Jikoa Monu to speak for the Claimant acting as its McKenzie friend. Mr Monu is a practising solicitor but does not have rights of audience in the higher courts.

10. Having regard to the Practice Note "*Practice Guidance: McKenzie Friends (Civil and Family Courts)*", I was cautious about allowing Mr Monu to take a role in the proceedings which included advocacy and before consenting to this I sought to establish the reasons why the Claimant could not represent itself.

11. Mr Monu explained that this was because the director representing the Claimant, Mr Nduka-Eze, was concerned that he would be too emotional about the Claimant's case to present it effectively. Mr Monu explained that he was not acting on a commercial basis, and would not be paid for advocacy and that he had become involved because he was a cousin of a director of Zumax.

12. The Defendant expressed itself to be neutral as to whether Mr Monu should undertake this role.

13. Having regard to this, to the explanations provided by Mr Monu, and to the fact that the hearing was being conducted remotely, with Mr Monu and Mr Nduka-Eze being in separate buildings so that the more traditional role of a McKenzie friend was more difficult to fulfil, I consented to Mr Monu speaking on behalf of the Claimant.

14. As it transpired, Mr Nduka-Eze did also himself speak on behalf of the Claimant. He did so in a calm and measured way such that, in hindsight, I concluded that Mr Monu's involvement as an advocate was not as necessary as I had originally been given to believe.

THE APPLICATION FOR JOINDER

15. The court had received a late application from a company called Zumax Estoppel Limited ("**ZEL**") for that company to be joined to the action to become a co-claimant with Zumax. This company had been formed by parties associated with Zumax. The court was told that it was the assignee of all or almost all of Zumax's rights in the litigation.

16. I refused to hear this application at this hearing on two grounds.

17. The first was that the application had been served very late to be considered at this hearing. The Defendant had had no or little opportunity to consider the documentation supporting the application.

18. The second was that it was by no means clear that the application had been properly approved by the directors of ZEL. The company has two directors, Mr

Mr Nduka-Eze and Mr Ebo Coleman. They were both in court. Mr Nduka-Eze denied that he supported the application as a director of ZEL. He also confirmed that the application was not supported by the Claimant.

19. In view of this information, I informed Mr Coleman that the court would wait to see a board resolution supported by both directors of ZEL before hearing the application. In view of the complex nature of this litigation and the relationship between the 2019 Claim and the 2013 Claim (and in particular the outstanding amount due from Zumax under the CA Order), I do not consider it is suitable for this joinder application to be considered on paper. If it is pursued, this should be at a hearing where the Defendant and the Claimant, as well as ZEL, may be heard.

THE DEFENDANT'S APPLICATION

20. The Defendant's application dated 7 April 2021 requested an order:

    i) lifting of the stay of the 2019 Claim imposed by the consent order dated 6 November 2019 so as to allow the Defendant to make an application for the Court to dismiss the 2019 claim as an abuse of process;

    ii) confirming that the Defendant's application to strike out these proceedings as an abuse of process does not amount to a submission to the jurisdiction; and

    iii) giving directions for a hearing in relation to its striking out application.

21. The Defendant accompanied its application with a draft of the order it was seeking.

THE CLAIMANT'S REQUEST FOR AN ADJOURNMENT

22. The Claimant asked the court not to rule on this application, but instead to adjourn in order to give the Claimant more time to consider its response.

23. The Claimant argued that this was necessary and appropriate because it had been unable to find the means to pay legal fees primarily, it alleged, because of what it said were wrongful actions taken by the Defendant in relation to receiverships imposed by the Defendant over certain of its assets in Nigeria.

24. It also argued that because it had achieved a judgment against the Defendant in Nigeria, dealing with these matters should be delayed until it had had an opportunity to register the judgment for enforcement in the United Kingdom. It hoped to be able to set off the amounts owing to it from the Bank under this judgment against the amount that it still owed under the CA Order.

25. I did not agree that these points provided any good reason not to hear the application.

26. The points made by the Claimant about the Defendant's conduct in Nigeria (which were denied by the Defendant), even if true (about which I make no

finding) did not seem to me to be relevant in relation to the matters raised for consideration at this hearing, although they might have some relevance to the application for striking out. In my view, the hearing of the application for striking out would be the appropriate time for these points to be aired and tested, to the extent that they may be relevant to the striking out application itself.

27. Neither did I agree that the Claimant should be given more time to deal with the matters to be dealt with in this hearing, so that it could obtain legal advice. It was clear to me that the Claimant was perfectly able to deal with the issues under consideration at this hearing, especially given the limited scope of this hearing, which was merely paving the way for a substantive hearing in relation to a striking out application.

DECISION IN RELATION TO THE DEFENDANT'S APPLICATION

28. Having heard both parties in relation to the Defendant's application, I decided to grant the Defendant the relief requested.

Lifting the stay

29. I could see no reason to deny the Defendant's request to lift the stay of the 2019 Claim imposed by the consent order dated 6 November 2019. The stay had been granted by consent when the 2019 Claim had been regarded as a backup to the original 2013 Claim. It was now the only claim between the parties. The legal proceedings in the United Kingdom between these parties had been in train at least since 2013. It was reasonable for the Defendant to require that they should be brought to a head.

30. The Claimant's only argument against this was to repeat the point that it needed more time to obtain a new legal team and to prepare to deal with the Defendant's proposed striking-off action. As, in the Claimant's submission, its inability to fund the litigation had come about through the wrongdoing of the Defendant in relation to proceedings in Nigeria, the Claimant argued that it was only fair that the court should afford the Claimant more time.

31. It did not need seem to me that this argument was of any great relevance to the decision whether to lift the stay. To the extent that the Claimant required time, for whatever reason, to prepare to answer an application for striking off, this could be dealt with through the directions given for that application. Accordingly, I decided to order the lifting of the stay whilst listening sympathetically to the Claimant's arguments in relation to the proposed timetable for dealing with the striking out application.

Non-waiver of the Defendant's objection to jurisdiction

32. The draft order that the Defendant had put forward included provisions confirming that the Defendant's action in bringing forward the application for striking out should not be regarded as evidencing any acceptance of the Court's jurisdiction in relation to the 2019 Claim.

33. Ms Melwani explained that this should be seen as something which would promote efficient case management.

34. I accept her argument that if this declaration were not included, the Defendant would need to make its case regarding jurisdiction either as a preliminary matter or alongside its striking out application. In her view (which I also accept), resolving the jurisdictional point would involve a great deal more time and expense than would be involved in dealing with the striking out action. If the striking out application should prove successful, this cost and expense would be saved. If it should not prove successful, then nothing would be lost by dealing with this as a preliminary matter before going on to deal with the jurisdictional issues and (if the Defendant then also loses also on the jurisdictional issues) dealing with the substantive issues in the case.

35. Ms Melwani took me to the decision of the House of Lords in *Williams & Glyn's Bank Plc v Astro Dinamico Compania Naviera S.A.* [1984] 1 WLR 438, where similar circumstances were considered. In that case, it was found that a party that was contesting the court's jurisdiction could apply for a stay of proceedings without that constituting a waiver of their objection to jurisdiction. In his speech (with which the rest of the court agreed), Lord Fraser of Tullybelton said that:

> *I am of opinion that the Court of Appeal rightly held that the learned judge had erred in law when he decided that the application for a stay necessarily implied acceptance of the jurisdiction.*

36. Similarly, I cannot see that an application for striking out provides any necessary implication that the Defendant has accepted the jurisdiction of the court in relation to the 2019 Claim.

37. Lord Fraser went on to approve the case management approach enunciated by Robert Goff L.J. who had given the leading judgment in the Court of Appeal:

> *It is enough to say that his view was that a decision on the application for a stay could probably be reached by the court after a hearing lasting not more than one day, whereas a decision on the question of jurisdiction would take much longer and would involve considerable inquiry into the facts.*

38. I therefore consider that I am in good company in accepting a similar case management approach in this case.

39. Following the conclusion of the hearing, the Claimant drew my attention to the decision in *Glencore International AG v Exter Shipping Ltd and others* [2002] EWCA Civ 52 and has asked me to accept that the reasoning in that case should be followed rather than that in *Williams & Glyn's Bank*.

40. I do not accept the Claimant's argument on this point, as it applies to the current application. In the *Glencore* case, the respondents who were disputing jurisdiction in relation to a claim had brought claims or counterclaims that were closely related to the claim over which they were disputing jurisdiction. These circumstances are entirely different to those applicable to the current application. The Defendant has not brought any claim against Claimant: it is merely seeking

the striking out of a claim made against it that it says is an abuse of process, and asking for this striking out application to be dealt with ahead of the court determining the matter of jurisdiction. These facts are different to those in *Glencore*. They are much closer to those in the *Williams & Glyn's Bank* case where the party concerned was requesting a stay of the action.

41. My view, that the issues dealt with in *Glencore* are wholly different from those dealt with in *Williams & Glyn's Bank*, is borne out by the fact that no reference was made to the latter case in *Glencore*. Given the heavily lawyered nature of the *Glencore* litigation it is unlikely that this was the result of an oversight.

42. Certainly I must dismiss the suggestion made by the Claimant that *Glencore* rather than *Williams & Glyn's Bank* represents "the correct legal position on that matter". There is no suggestion within *Glencore* that the learned judges in that case were seeking to overrule *Williams & Glyn's Bank*, or even to qualify it. In any case, a decision of the Court of Appeal could not overrule a decision made in the House of Lords.

43. This is not to say that, when the question of jurisdiction does come to be decided (if it does), the Claimant may not bring arguments based on *Glencore* relating to the Defendant's involvement in the 2013 Claim. I make no determination as to the merits of any such argument.

44. However, the current application does not involve the court having to decide the question of jurisdiction, only the question whether bringing the application for striking out is incompatible with the Defendant's denial that the English court has jurisdiction over the 2019 Claim. I am satisfied that this is not the case. *Williams & Glyn's Bank* remains good law and its principles should be applied in relation to this application.

45. There is no doubt that the Defendant has made it clear at every stage that it does not accept the jurisdiction of the English courts in relation to these matters. I accept the reasoning that determining the question whether the Defendant is correct in this stance may most conveniently be deferred until the question of the strike out application has been considered. I therefore accept the Defendant's submission on this matter

CASE DIRECTIONS

46. Having accepted the Defendant's case on these matters, I should give an order in the form Defendant has requested, subject to amendment to the timescales contained in the Defendant's draft order.

47. In relation to these timescales I have accepted the Claimant's request that it should be given a lengthy period in order to obtain new legal counsel and give its counsel time to get up to speed. I will order that the application for striking out should not be heard before 3 October 2022 and require other adjustments to the timings proposed in the draft order as were discussed at the hearing.

48. I have asked Ms Melwani to draw up the order reflecting these discussions, and will order accordingly.

COSTS

49. The Defendant, I would say generously in view of the outcome of this hearing, proposed costs in the case, and, having heard from the Claimant, I have agreed to award costs on that basis.