Case No: CL-2013-000625
CL-2014-000916
CL-2010-000804

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Neutral Citation Number: [2020] EWHC 3936 (Comm)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 10 January 2020

BEFORE:

HIS HONOUR JUDGE MARK PELLING QC
(Sitting as a Judge of the High Court)

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED

Claimant

- and -

JOHN FORSTER EMMOTT

Defendant

The Claimant company was represented by Mr **MICHAEL WILSON** in person
The Defendant, Mr **JOHN EMMOTT,** appeared in person

JUDGMENT

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(Official Shorthand Writers to the Court)

1. JUDGE PELLING: This is an application made by Michael Wilson & Partners Limited, the claimant in these proceedings and defendant to the application, for an order adjourning the business listed for today to a date to be fixed for the convenience of a leading counsel yet to be identified to be appointed by him and Mr Buttimore, junior counsel, acting on his behalf, or possibly Mr Doctor QC and Mr Buttimore and to a date when Mr Shepherd QC on behalf of Mr Emmott can appear.

2. The background to these proceedings insofar as is relevant to this present application is as follows. There was an application issued by Mr Emmott by which he sought the appointment of a receiver by way of equitable execution in relation to a judgment obtained from an English court judgment giving effect to an underlying arbitration award. That application was listed (together with other applications) before me on 20 and 21 November last. At the end of that two day period, various orders had been made and it was left that counsel would formulate the appropriate order setting out the various orders and directions given.

3. Of particular importance on that occasion was how the application for the appointment of a receiver by way of equitable execution was to be disposed of. The underlying and central submission made in relation to that application by Michael Wilson & Partners was this, that all the assets (or most of them) over which it was sought to appoint the receiver, were already pledged in various ways to another entity called Kazakh Holdings. It would have been necessary at least in passing to deal with that issue on the application and the point that concerned the parties was that, if that issue was dealt with in a way that was not binding upon Kazakh Holdings, then there was a substantial risk that any receiver who was appointed pursuant to the application would become ensnared in litigation concerning Kazakh Holdings whenever and wherever the receiver sought to execute against the relevant assets. In those circumstances it had been agreed by the parties that it would be desirable if Kazakh Holdings was joined in as a party to these proceedings.

4. With that in mind, I am reminded by Mr Emmott, I directed that notice of these proceedings be given to Kazakh Holdings in circumstances where it had been agreed by both parties that they would not resist an application for Kazakh Holdings to be joined into the proceedings. On that basis and in those circumstances, I directed a short

adjournment of the application for the appointment of a receiver by way of equitable execution in order to see what reaction Kazakh Holdings would give to the proposed application, the proposal that they participate in these proceedings and be bound by them.

5. There is a difference of view between the parties as to what was directed as to when this hearing was to be relisted. The submission which is made by Mr Emmott is that I directed on that occasion that these proceedings be relisted to be heard on 10 January 2019 and that that was an arrangement which was made for the convenience of counsel and was agreed at the hearing. Mr Wilson, speaking on behalf of Michael Wilson & Partners, does not accept that was so and maintains that it was left that the date for that hearing would be fixed on a date which was convenient to all counsel.

6. In my judgment, on the material that is currently available, Mr Emmott's version is to be preferred in relation to that issue and I accept in relation to that point that in the draft order prepared by Mr Holland QC, who acted at the hearing on behalf of Michael Wilson & Partners, there was inserted into the order by him a few days after the completion of the November hearing, that the application would be adjourned until 10 January 2019 as reflecting the order that had been made in relation to that.

7. What then happened is that a dispute developed between the parties as to what should appear in the order following the hearing that took place before me in November last. That dispute became somewhat heated and I directed that the best and shortest way of resolving that dispute was for there to be a short hearing at which the terms of the order could be settled. I proposed various dates in December which were not acceptable because various counsel were not available. Therefore I directed that the question of the terms of the order to be made following the hearing on 21 November should be adjourned to be dealt with at the same time as the other issues that have to be dealt with no 10 January.

8. As matters now turn out the position is this. Mr Holland QC, who appeared on 20 and 21 November on behalf of Michael Wilson & Partners is not available and there is no reason to suppose that he will ever now be available to act on behalf of

Michael Wilson & Partners Limited because of a dispute that has developed, as I understand it, concerning the source of fees to be paid to him. Mr Buttimore, junior counsel for Michael Wilson & Partners, is not available today and it was submitted by Mr Wilson was never going to be available on 10 January. Mr Shepherd, on the other hand, who had said that he was going to be available on 10 January, is now no longer available, though it is unclear (to me at any rate) why that should be so having regard to the agreements that had been reached at the hearing in November. That then is the background to an application which is made by Mr Wilson for an adjournment of the hearing today.

9. As is apparent from what I have said so far, the business of today's hearing will be for the order following the hearing on 20 and 21 November to be settled, and secondly for the onward directions to be given for the final disposal of the hearing of the application for the appointment of a receiver by way of equitable execution.

10. Mr Wilson submits that I should adjourn these proceedings because, as matters currently stand, he is unassisted by any counsel. Mr Buttimore cannot be here today and has never been available to be here today, Mr Holland is not available and is unlikely ever to be available and alternative silks that have been approached are not available for today's hearing; they may be available in early course for the future.

11. It is submitted that Mr Shepherd is not available either so Mr Emmott is in a similar position. So far as that is concerned, Mr Emmott is unconcerned by that. He appears in person, assisted by his solicitor in the capacity of a McKenzie Friend, and his submission is that this hearing should proceed and the business that is before it should be dealt with.

12. It was submitted by Mr Wilson that on an earlier occasion Moulder J had ruled that applications in these proceedings should only be heard when Mr Shepherd QC was available to appear on behalf of Mr Emmott. That is not Mr Emmott's submission. No attention has been drawn by Mr Wilson to any order which records a direction to that effect and my understanding and recollection from what I was told previously, was that the hearing that was adjourned involved the adjournment of a part-heard hearing that involved some cross-examination of witnesses.

13. However, that is immaterial as it seems to me. The question whether or not cases should be adjourned for the convenience of counsel are ultimately a case management decision for each individual judge to arrive at. It is said that Mr Wilson is prejudiced by the non-availability of counsel. In my judgment, this is a hearing which had been listed for 10 January. It was listed on 21 November for hearing today. If counsel cannot be available that is not a good reason for adjourning hearings. Every time hearings of half days or longer are adjourned, there is a waste of public resources which the public had bought and paid for. There is another difficulty that other litigants are delayed in their access to the courts by the need to fix further hearings as a result of late adjournment.

14. The issues which have to be resolved at today's hearing are not issues of substantive importance. The only issues which fall to be resolved are the terms of the order to be made following the hearing on 20 and 21 November and the question what additional directions ought to be given concerning the final disposal of the application by Mr Emmott for the appointment of a receiver by way of equitable execution. These are issues which can be dealt with today. It may well take far longer to deal with with litigants in person than would be the case with counsel being present, but that is not of itself a reason for adjourning these applications. To adjourn an application of this sort in these circumstances where it was arranged in the circumstances I have indicated, would be an unacceptable waste of public resource and is not to be countenanced. In those circumstances, the application for an adjournment is refused and I propose therefore to proceed with the business before the court by first inviting submissions in relation to the terms of the order to be made following the hearing on 20 and 21 November and then turn to the extent necessary for directions as to the final disposal of the application for the appointment of a receiver.

(**After further submissions**)

RULING ON APPLICATION TO REDUCE FREEZING ORDER

15. I am in the course of working out the terms of an order which reflects various rulings that were made at a hearing on 20 and 21 November last. So far I have been able to agree the terms or settle the term of an order without undue controversy.

16. The controversy that now arises concerns paragraph 7 in the draft order prepared by Mr Holland QC, leading counsel then appearing on behalf of Michael Wilson & Partners. As originally drawn 7 was to this effect, "The issues as to amount now recoverable under the third quantum award maximum sum to be covered by the freezing order adjourned for determination on 10 January 2020 with a time estimate of one day."

17. It was contemplated that on that day there would be a hearing attended by both leading counsel in order, amongst other things, to carry into effect the various rulings that had been made of which of the most important by a very significant margin was that concerning the scope of compound interest. There is no dispute (at any rate now) that paragraph 6 of the order should record that compound interest is not recoverable under the arbitrator's third quantum award and thus interest at the rate of 8 per cent per annum is to be calculated on the capital sum set out at paragraph 14 of that award only.

18. During the course of the hearing, counsel for Michael Wilson & Partners produced a schedule which was handed to Mr Shepherd QC for consideration and which was designed to take account of these various decisions concerning the sums that I made rulings on on 20 and 21 November last. The understanding was that Mr Shepherd and his solicitors and his client were going to take that away, consider it and it was anticipated actually that there might even be agreement reached as to the sums involved.

19. In fact, for reasons which are entirely unclear to me, notwithstanding the directions that I gave at the time, the parties have not prepared for dealing with this issue; Mr Emmott in particular has failed to respond to the schedule that was produced and in the end result therefore we are no further on than we were on 21 November.

20. Mr Wilson submits that this is all very unfair and unjust because he produced a schedule which is in evidence which made clear what he said the calculations were that resulted from the rulings I have made. I agree that he produced a schedule to that effect and it is at page 66 in the bundle. The point remains, however, that it has not been agreed but it is not apparent what impact Mr Emmott accepts the various rulings I made had on the sums which would be secured.

21. I agree with Mr Wilson it seems highly likely that there will be a significant reduction having regard particularly to the ruling concerning compound interest. However, it would be wrong for me at this stage to simply accept that figure as read without giving Mr Emmott one final (but very short) opportunity to respond sensibly to what Mr Wilson has said.

22. In those circumstances, I propose to direct as follows, namely that "The issues as to the amount now recoverable under the third quantum award, maximum sum to be covered by the freezing order", insert the words "having regard to the ruling concerning compound interest and other rulings made at this hearing", "are adjourned for determination on the first available date after 17 January 2020 and it is further directed that, unless by 17 January 2020 the defendant files and serves a counter-schedule setting out the consequences of the rulings made at this hearing, the sums frozen by the freezing order shall be reduced to £2,567,249."

23. In my judgment, setting the order in this way strikes the right balance so far as fairness and justice is concerned. It reflects the fact that Michael Wilson & Partners have supplied the relevant information on their case as to what the effect of the rulings were, but have not had a response, but gives Mr Emmott one last opportunity to respond constructively to what has been said. But in the event that there is no response, then the scope of the freezing order will be reduced to the figure that I have indicated.

(**After further submissions**)

JUDGMENT ON FORM OF ORDER

24. Paragraphs 10 and 11 are now what I am concerned with. Mr Wilson submits that what was required was formal service of the application and evidence but that requires to be served in accordance with BVI law and therefore serving it by email in the way that in fact has happened was not a proper or a sufficient compliance with the order.

25. I reiterate, as I have reiterated a number of times already, that I am concerned with formulating the terms of the order. I am not concerned with compliance with it as such other than in limited respects. The key point, however, is that contrary to what

Mr Wilson submits, I did not direct that there should be formal service of proceedings in the sense of serving under Part 6. What I was doing was requiring that there be a direction that the defendant give notice of these proceedings by serving a copy of the application and all the evidence in the application on KHI at its registered office, not for the purpose of binding them then as a party but for the purpose of facilitating what is provided for in paragraph 11, namely that it could apply for permission if it chooses to apply pursuant to CPR Part 19.4 to be added as a party to the application.

26. Therefore, I disagree with Mr Wilson as to the submissions he makes and in principle I agree with the submissions made by Mr Emmott. Therefore, paragraph 10 will read as follows, "JFE is forthwith to give notice of these proceedings by serving a copy of the application and all the evidence in the application on KHI at its registered office. Permission is given to the extent necessary to give notice in accordance with this paragraph by email."

(**After further submissions**)

27. The issue I now have to decide concerns the terms of paragraph 11 of the draft order. Paragraph 11 as drafted by Mr Holland QC, leading counsel for MWP is in these terms, "KHI has permission, if it chooses, to apply pursuant to CPR 19.4 to be added as a party to the application, the court noting that JFE indicated through his counsel that he will not oppose such an application if made."

28. The relevant part of the transcript is to the following effect. By way of context I had suggested a procedure not dissimilar to that which in the end found favour with the parties and was inserted in paragraphs 9 and 10 of the draft order and the first part of paragraph 11, namely extending an opportunity to KHI to be joined into the proceedings and bound by the result. Against that context, following the end of the luncheon adjournment at 2.02 pm, Mr Shepherd rose and informed me as follows:

> "My Lord, wonders will never cease. This is a wonder and it is one I did not expect to hear, but my learned friend Mr Holland has indicated that the procedure that your Lordship outlined and indicated which certainly found favour with this side has done the same with that side. I will need to show your Lordship what power you have to do what we both invite you to do …

> Mr Shepherd: … What I was going to suggest was that rather than provide for a provision to serve out on KHI, and I have discussed this with my learned friend, is that under 19.4 that is a procedure for adding a new party, who can apply to be joined and that I was going to suggest to your Lordship that your order should recite that KHI may apply to be joined as a party to the determination of the issue and if they do Mr Emmott will consent to them being joined."
> (Quote unchecked)

29. The general effect of this part of the discussion is entirely clear, that the process was a consensual one as concerned both Mr Wilson and Mr Emmott whilst of course leaving it free to KHI to make its own decision as to whether to be joined into the proceedings or not. In those circumstances, in my judgment, it is appropriate that paragraph 11 of the draft order should rehearse that it was indicated by or on behalf of each of the parties to these proceedings that if an application were made by KHI under CPR Part 19.4 they would not oppose that application.

30. Accordingly, therefore, paragraph 11 of the order will be in the following form, "KHI have permission if it chooses to apply pursuant to CPR Part 19.4 to be added as a party to the application, the court noting that both MWP and JFE indicated through their respective counsel that they would not oppose such an application if made." Whilst it is perfectly true to say that Mr Holland did not say in terms that he agreed with the process identified by Mr Shepherd and that MWP would take a like position, he was sitting there, listening to what Mr Shepherd said and would of course have objected had it been necessary for him to do so.

31. In those circumstances there will be an order in the terms that I have just identified.

(**After further submissions**)

32. The issue which now arises turns on the failure to pay some costs. The order, the terms of which I settled just a moment ago, provided and recorded that on 21 November last I dismissed an application by Mr Wilson for an order that I recuse myself and an order that the hearing listed for 20 and 21 November be adjourned and I ordered that MWP should pay JFE's costs thrown away, summarily assessed in the sum of £8,500 plus VAT if applicable.

33. To be clear, contrary to what Mr Wilson submitted or impliedly submitted, this was not a payment on account; this was the summary assessment of the costs payable in respect of the applications which had failed. Therefore, he became liable to pay that sum, or rather MWP became liable to pay that sum within 14 days of the date of the judgment or order was made: see CPR 44.7.

34. The complaint which is made by Mr Emmott is that this has not been paid. He says that there should be an order that in effect MWP be debarred from further defending his application for the appointment of a receiver unless this sum is paid.

35. It is submitted by Mr Wilson first that there is no application for an order in those terms; secondly, that there is an issue, at any rate so far as MWP is concerned, as to whether or not Mr Emmott is entitled to recover costs at all because he disputes that there is any liability on Mr Emmott's part to meet the costs bill being incurred by solicitors and counsel in defending these proceedings. Furthermore, and if and to the extent it is necessary to take the matter further, there is a large sum held in the Court Funds Office which more than secure the sum in question.

36. There are a number of points which arise out of that. First of all, so far as the sums in the Court Funds Office is concerned, in my judgment that takes matters no further. They are not relevant to the order that I made on the last occasion. In relation to the suggestion that there is no right to recover costs because Mr Emmott is not under a liability to meet his solicitors and counsel's fees is concerned, that is an issue which is simply not alive because, if there was a time for arguing that, that time was when the order was made and it either was not argued or, if it was, it was an argument that was rejected as unsupported by evidence or wrong.

37. Therefore, the only point that is left is whether or not I should make an order which effectively debars Michael Wilson & Partners from further defending the application for the appointment of a receiver unless this sum is paid.

38. With some reluctance I have to say I accept the submission made by Mr Wilson that in the absence of a formal application, it would be unfair and unjust to make an order in

the terms which are sought, but nonetheless, as it seems to me, the failure to pay is not one which carries with it any sense of conviction or justification.

39. In those circumstances, what I propose to do is to extend Mr Wilson's time for making the payment for a period of ten days, after which if the sum is not paid, Mr Emmott will be at liberty to apply for the order that he has sought.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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