Neutral Citation Number: [2020] EWHC 778 (Comm)

Case No: CL-2018-000298

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

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

Date: 22/04/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

- -

Between :

TYNDARIS, SAM	**Claimant**
- and -	
MMWWVWM LTD.	**Defendant**

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- -

Sonia Tolaney QC and **Tony Beswetherick** (instructed by **Dechert LLP**) for the **Claimant**

Joe Smouha QC and **Jeremy Brier** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Defendant**

Hearing dates: 27 March 2020

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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.

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THE HONOURABLE MRS JUSTICE MOULDER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 22nd April 2020.

Mrs Justice Moulder :

1. This is the judgment of the court on two linked applications:

   i) the application of the defendant dated 25 February 2020 for an order that unless the claimant pays the final instalment of security for costs in accordance with the order of Knowles J dated 22 March 2019 (the "March Order"), the claim in these proceedings should be struck out (the "Application for an Unless Order"); and

   ii) the application of the claimant dated 6 March 2020 (the "Variation Application") to vary the March Order and reduce the total amount of security for costs ordered by Knowles J to the sum that it has already paid into court.

2. In support of the Variation Application, the claimant has filed the third witness statement of Mr Costa dated 6 March 2020.

3. The hearing of the Application for an Unless Order and the Variation Application was held remotely via video conferencing due to the Coronavirus but with full written and oral submissions from leading counsel.

Background

4. The claim in these proceedings arose out of a contract dated 29 November 2017 for the provision by the claimant ("Tyndaris") of investment management services to the defendant ("VWM"). Between December 2017 and February 2018 Tyndaris traded a managed account for VWM. On 14 February 2018 VWM suspended trading.

5. In May 2018 proceedings were issued by which the claimant claims management fees of around $2.8 million from the defendant relating to the management of the account by Tyndaris. VWM counterclaims for damages for breach of contract or misrepresentation in the sum of approximately US$22 million.

6. Both parties applied for security for costs. By the March Order, Knowles J ordered Tyndaris to pay US$750,000 by way of four staged payments. The order expressly provided for liberty to apply to vary the amount of security and in the event of default by the other party. The March Order also approved the parties' costs budgets which, in the case of the defendants, was approved in relation to the defence of the claim in the aggregate sum of approximately US$900,000.

7. Tyndaris made payments into court of the first three payments making a total paid of US$487,500.

8. On 19 February 2020, the date on which the fourth and final payment was due in respect of the security for costs, the solicitors for Tyndaris notified VWM that Tyndaris was not in a position to make the final payment into court of US$ 262,500. The solicitors, Dechert LLP, wrote that:

   > "The claimant had hoped to secure funding to make the payment referred to at paragraph 1d of the [March Order] (the "Security Payment") but it became apparent during the course of this week that that would not be possible. Accordingly, the claimant has

> not made the Security Payment today and it does not anticipate being in a position to do so in the immediate future."

9. On 25 February 2020 VWM issued its application for an order that (in substance) unless the claimant made the final payment into court within seven days, the claim would be struck out.

10. The trial of the action is due to commence on 22 April 2020 and is expected to last approximately three weeks.

Application for an Unless Order

11. The basis of the order sought (as set out in the application notice) was that the claimant had failed to make the final payment, had confirmed that it was not and will not be in a position to make the final payment and there was accordingly good reason to believe that the claimant will not be able to pay the defendant's costs of defending the claim. Accordingly, because the trial in the action is due to commence on 22 April 2020, and in light of the proximity of trial, the breach of the March Order and the claimant's indication that it does not anticipate being able to comply with the March Order, the defendant sought an order that unless the claimant makes the payment within seven days, the claim is struck out and judgment entered for the defendant.

Submissions

12. It was submitted for the claimant that the court should dismiss the Application for the Unless Order and grant the Variation Application as there had been a material change in circumstances since the March Order. It was submitted that the material changes were:

    i) in relation to the extent of the counterclaim; and

    ii) in relation to the financial situation of Tyndaris.

    In relation to the latter it was submitted for the claimant that, had the financial situation prevailed at the date of the March Order, a different order would have been made as the court will not make an order for security for costs that a claimant cannot comply with and where the effect would be to stifle a good claim.

13. It was further submitted for the claimant that in effect this is an application for strike out and that such an order would be disproportionate: *Walsham Chalet Park v Tallington Lakes* [2014] EWCA Civ 1607.

14. For the defendant it was submitted that Tyndaris had not established that it was unable to provide the security: in his witness statement (at paragraph 26) Mr Costa referred to the claimant's accounts to 31 December 2018 which show cash at bank of some €509,000 but stated that since the date of those accounts that sum has been "depleted" by the costs of this litigation and "other ongoing expenses of operating the claimant". Mr Costa also stated that the only significant asset or turnover shown in the 2018 accounts is the fees due from the defendant and that the 2019 accounts were not yet complete but they will not show any further turnover. However it was submitted that Mr Costa had failed to address the current position of the claimant as to cash.

15. It was also submitted for the defendant that Mr Costa is a man of "apparent wealth" and reference was made to his superyacht being for sale for $21.9 million and his address in Monte Carlo.

Discussion

16. The first question for the court is whether the March Order should be varied by reason of a material change in circumstances and in particular whether an order to enforce the March Order and refuse the Variation Application would stifle the claim.

17. The following principles can be derived from *Goldtrail Travel v Aydin* [2017] 1 WLR:

    i) It is for the claimant to establish on the balance of probabilities that the payment would stifle the claim; the defendant cannot establish matters relating to the reality of the claimant's financial position of which he probably knows little: *Goldtrail* at [15].

    ii) Even when the claimant appears to have no realisable assets of its own a condition for payment will not stifle the claim if it can raise the required sum. The court must be cautious when a defendant suggests that the claimant can raise money from its controlling shareholder - the shareholder's distinct legal personality must be respected and the question should always be can the company raise the money (*Goldtrail* at [18]).

    iii) Where the claimant refutes the suggestion that the necessary funds would be made available by the owner, the court should not take the refutation at face value; it should judge the probable availability of the funds by reference to the underlying realities of the company's financial position and by reference to all aspects of its relationship with its owner including the extent to which it is directing its affairs and is supporting and has supported it in financial terms (*Goldtrail* at [24]).

18. It was submitted for the claimant that its financial position had changed such that it was simply unable to meet the final obligation. The evidence of Mr Costa is that in April 2019 following a press article discussing this litigation, the main investor in the claimant expressed concerns about the reputational damage of being associated with the claimant. Mr Costa's evidence is that he was informed that the investor did not want to continue to invest with the Tyndaris group and he was given an ultimatum to sell the entire Tyndaris group (other than the claimant and its immediate parent) or it would not invest any further capital and would enforce its rights under a convertible loan to force a sale of the group. Mr Costa stated that he did not receive any substantial consideration from the sale and as a result of that sale the claimant "no longer has the benefit of funding from the wider group" and has not been able to transact any other business and generate any other revenue.

19. Whilst the claimant has provided evidence as to the loss of funding from the group, the claimant has not provided any details of the amount of cash currently held by the claimant. There is only a vague reference to the sum of €509,000 having been "depleted" without any specific numbers being provided and it is unclear why if the company is not trading (and thus it can be inferred its accounts are very

straightforward), it could not have provided draft or actual 2019 accounts or a statement on its behalf as to the amount of cash at bank.

20. Even if the claimant itself does not have cash or realisable assets, the court has to consider the evidence as to whether the claimant could raise the sum. As to the prospect of the claimant obtaining funding from a third party, Mr Costa states (at paragraph 30 of his witness statement) that:

> "a third party had indicated to me and to Mr Schwartz on several occasions that as a former director of the claimant, he would be willing [to] fund the payment. I therefore believed that the payment could be made."

He then states that such funding was not received nor was any confirmation that payment would be forthcoming from the third party.

21. Mr Costa does not address in his evidence any other potential sources of funding that may be available to the claimant other than the bald assertion (at paragraph 29 of his statement) that he is "not in a position to make the final payment of security for costs" and "nor are any of the other directors of the claimant". Not only does he not provide any evidence to support this assertion but it appears to be partly undermined by the subsequent sentence in that paragraph:

> "Nor is it reasonable to expect the directors to provide such funding even if they could do so."

22. The second and third tranches of the security were funded by Mr Schwarz and Mr Costa, respectively. Mr Costa provides no explanation as to his own position nor why it would not be reasonable for the other directors to provide funding. He admits that he owns 99% of the ultimate beneficial interest in the claimant's immediate parent (paragraph 24 of his witness statement).

23. Finally in his conclusion (paragraph 33 of his witness statement) Mr Costa states that if the claim is struck out and he has to issue a new claim following a successful defence of the counterclaim, the claimant will find it "challenging" to find the financial resources to do so. I find such a statement difficult to reconcile with the contention that the claimant cannot raise the funds to make the final payment of security for costs.

24. In my view the claimant has not produced convincing evidence either that the claimant itself does not have the resources to make the final payment or that it does not have access to resources. Accordingly I am not satisfied that the March Order should be varied on the basis that it would stifle the claim.

25. It was also submitted for the claimant that there had been a material change in circumstances by reason of the "evolution" of the counterclaim.

26. In my view it is clear from the transcript of the hearing before Knowles J and his judgment, that Knowles J heard full written and oral argument before reaching his decision on security for costs. It is clear that Knowles J took into account the scale of the counterclaim and the decision in *BJ Crabtree (Insulation) Ltd v GPT Communication Systems Ltd*. Knowles J had regard to the fact that the counterclaim

would go ahead whether or not the claim were to proceed. The amount ordered by Knowles J in respect of the claim reflected the small proportion which the claim represents of the overall proceedings.

27. Whilst the counterclaim has been amended and the costs associated with it (including the scope of the expert evidence in regard to the counterclaim) have risen significantly since the March Order was made, that does not in my view affect the appropriate amount which the claimant should provide by way of security for the costs of its claim. The fact that the costs of the counterclaim have increased significantly since the matter was before Knowles J does not affect in my view the correctness of the order made in relation to the claimant nor does it amount to a material change of circumstance in relation to the order imposed on the claimant. I note that Knowles J was aware that of the claim, $1.4m was admitted to be owing (subject to the counterclaim) and this is not therefore a matter which would justify revisiting the order made.

28. For all these reasons therefore I do not accept that there has been a material change of circumstances by reason of the "evolution" of the counterclaim which would justify a variation of the March Order.

29. The issue is then whether it is proportionate to make the unless order with the sanction that, in default of compliance, the claim will be struck out.

30. It is submitted for the claimant that this would be disproportionate. Counsel for the claimant referred the court to Briggs LJ in *Walsham Chalet Park* at [44]:

> "44. The judge treated the principles in Mitchell as "relevant and important" even though the question in this case was whether to impose the sanction of a strike-out for non-compliance with a court order, not whether to grant relief under CPR rule 3.9 from an existing sanction. In my judgment, that was the correct approach. The factors referred to in rule 3.9 , including in particular the need to enforce compliance with court orders, are reflected in the overriding objective in rule 1.1 to which the court must seek to give effect in exercising its power in relation to an application under rule 3.4 to strike out for non-compliance with a court order. The Mitchell principles, as now restated in Denton , have a direct bearing on such an issue. It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see Mitchell paragraphs 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out. Mr Buckpitt drew our attention to the recent decision of the Supreme Court in HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64 , at paragraph 16, where Lord Neuberger quoted with evident

approval the observation of the first instance judge that "the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified"."

31. This is a case where there is no sanction imposed for breach of the March Order. Whilst therefore the principles in *Denton* are relevant, the court must also consider whether the sanction is proportionate in the circumstances.

32. Applying the three-stage test in *Denton*, it was not submitted for the claimant that this was not a serious breach and the claimant through leading counsel and Mr Costa apologised to the court for the failure to make the final payment.

33. As to the second stage, it was submitted that there was good reason for the position in which the claimant found itself. To the extent that matters with the third party unfolded as set out in the evidence of Mr Costa, I am prepared to assume that this amounts to a good reason why the payment date was missed (although as discussed above I do not accept that the claimant has established on the evidence that it is unable to make the payment).

34. As to the third stage, it was submitted for the claimant that in all the circumstances it would be disproportionate to strike out the claim:

    i) given the much larger and complex counterclaim the trial will proceed in any event; the factual and expert evidence has been completed and the witnesses will attend in any event;

    ii) Tyndaris has already provided security in the amount of $487,500;

    iii) $1.4 million of the claim is admitted to be due (subject to set off under the counterclaim);

    iv) this is not a deliberate breach.

35. I accept that this is not a case of a complete failure to comply with an order for security for costs such as to fall within the scenario contemplated by Sales J in *Meldex International v Trevillion* [2010] EWHC 1342 (Ch).

36. However it seems to me that to impose the sanction of strike out, if the unless order is not complied with, is not disproportionate in the circumstances of this case for the following reasons:

    i) I have found that the claimant has not established on the evidence that the payment of the outstanding amount will stifle the claim;

    ii) whilst there has been partial compliance in the sense that three of the four staged payments have been made, the amount which remains outstanding by reference to the total amount which Knowles J determined was appropriate in the circumstances is of such size as to be significant. To allow the claim to proceed on the lesser amount of security would reduce the security for the costs of the claim from the $750,000 determined by Knowles J to be appropriate to a sum of

only $487,500 against an approved budget (in relation to the claim) of approximately $900,000;

iii) whilst I accept that the trial of the counterclaim will go ahead in any event, this is not a valid reason why the defendant should now have to accept a significantly lower amount by way of security for the costs of the claim than previously determined by Knowles J and the fact that the trial will go ahead is not a sufficient justification not to give effect to the March Order.

Conclusion

37. For all these reasons the Application for the Unless Order is granted and the Variation Application is refused.