



Neutral Citation Number: [2023] EWHC 2558 (Comm)

Case No: CL-2020-000729

IN THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION
COMMERCIAL COURT

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

Date: 11 October 2023

Before:

Dame Clare Moulder DBE
Siting as a Judge of the High Court

Between:

Bank of Baroda and others
- and -
GVK and others

Claimants

Defendants

Karishma Vora (instructed by **Reed Smith LLP**) for the **Claimants**

Hearing dates: **11th October 2023**

Approved Judgment

I direct that 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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Dame Clare Moulder
(14:05pm)

Wednesday, 11 October 2023

1. The Court has to decide whether to proceed with this trial in the absence of the Defendants, pursuant to CPR 39.3. This is scheduled to be the third day of the trial, Wednesday 11 October 2023 (the second day of evidence, the first having been set aside for judicial pre-reading). Yesterday morning, Tuesday 10 October 2023, the Court heard and refused the Defendants' application to adjourn the trial for the reasons set out in the Judgment delivered at that hearing.
2. At the application to adjourn the trial yesterday, the only person present, who purported to represent the Defendants, was Mr Nayar, an Indian lawyer. Mr Nayar made an oral application to be permitted to make submissions on behalf of the Defendants on the application to adjourn. Mr Nayar, who is not a director or employee of the Defendants, was in effect relying on the general discretion of the Court to grant rights of audience in relation to particular proceedings. This application was also refused for the reasons set out in the judgment given on 10 October 2023.

Chronology

3. It is necessary to set out the chronology of the past couple of weeks in some detail.
4. The Defendants are currently without legal representation having parted company with Norton Rose and the counsel instructed for trial in late September 2023. They filed a notice that they would be acting in person dated 26 September 2023. In an email to the Court on 27 September 2023 with its notice of change of solicitor, the Legal Department of the First Defendant (which was given as the email contact on the notice of change and appears to hold itself out through the correspondence with the Claimants' solicitors and the Court as acting on behalf of the Defendants) stated that they would be "*actively seeking alternative representation*". I note that this is the second time the Defendants have parted company with their English representatives shortly before trial (having previously done so in May 2022 when the trial was adjourned). I also note the absence of any evidence before this Court to support the assertion that the Defendants have been "*actively seeking alternative representation*".
5. It is notable that in the period from that notice of change there has been a lack of engagement by the Defendants with the Court. There had been no indication of whether they had instructed alternative counsel, no response to the request to identify those individuals who were seeking remote access via the link (and thus would need to provide undertakings to the Court) and no indication whether a skeleton argument would be provided. As a result on 5 October 2023 the Court office sent an email to the Legal Department of the First Defendant asking who would be appearing at the trial for the Defendants. After close of business on 5 October 2023 the Legal Department responded:

"...it is stated that the Defendant is currently without any legal representation in the UK and is appearing in this matter 'in person' and seeks for Kartik Nayar to be its representative at the hearing..."

6. I directed the Court office to reply that the Defendants needed to seek permission from the Court and before the application for permission could be considered must provide the information referred to in the Commercial Court Guide section M3.1 which provides as follows:

“Although rule 39.6 allows a company or other corporation with the permission of the Court to be represented at trial by an employee, the complexity of most cases in the Commercial Court generally makes that unsuitable. Accordingly, permission is likely to be given only in unusual circumstances, and is likely to require, at a minimum, clear evidence that the company or other corporation reasonably could not have been legally represented and that the employee has both the ability and familiarity with the case to be able to assist the court and also unfettered and unqualified authority to represent and bind the company or other corporation in dealings with the other parties to the litigation or with the Court.”

7. This response was sent on the afternoon of Friday 6 October 2023. On the same afternoon (at 13.21) the Defendants submitted an application for the trial to be adjourned. I note that this was in the form of a duly completed application notice with a supporting witness statement from Mr Nayar. It must therefore have been in preparation prior to the email asking for Mr Nayar to represent the Defendants at the hearing.
8. Around 12.30 on Monday 9 October 2023 (the reading day for the trial) the Legal Department sent a further email referring to their application to adjourn which read so far as material:

“...Also as mentioned in our previous correspondence, we want to reiterate that despite continuous efforts, the Defendant has been unable to secure alternative legal representation for the application fixed for hearing tomorrow.

*...
In light of this ongoing challenge, we sought permission for Mr. Kartik Nayar to act as a representative on behalf of the Defendants and appear as the “party in person”. It is however clarified that Mr. Kartik Nayar is not an employee of the Defendants but is full authorized by the Defendants to act on its behalf. If there are any documentary evidence required in support of the same, the Defendants can arrange for the same.”*

9. The Court sent a response at 13.06 as follows:

“As set out in the previous email from the Court before permission can be granted for a representative to act on behalf of the Company the Court will require clear evidence that the company or other corporation reasonably could not have been legally represented and that the employee has both the ability and familiarity with the case to be able to assist the court and also unfettered and unqualified authority to represent and bind the company or other corporation in dealings with the other parties to the litigation or with the Court. These matters need to be addressed in evidence. As far as securing representation from counsel is concerned it is open to the Defendants to secure representation on the application to adjourn irrespective of whether they have representation for the trial and counsel are often instructed at short notice for urgent applications.” [emphasis added]

10. The Legal Department responded but failed to provide any evidence concerning the Defendants' purported attempts to secure alternative representation or Mr Nayar's familiarity with the case:

“In this regard, it is submitted that Mr. Kartik Nayar is not an employee of the Defendants but is a qualified lawyer and for all purposes is a representative of the Defendants. He is familiar with the details of the case and fully capable of providing assistance to the Hon'ble Court for the adjournment application.

Furthermore, we are prepared to provide the necessary documentary evidence to support this authorization if the same is needed. In light of this, we sought permission for Mr. Kartik Nayar to act as a representative on behalf of the Defendants and appear as the “party in person”.

In any event, we otherwise request the Hon'ble Court to accord permission to Mr. Kartik Nayar as a counsel being a qualified lawyer in India, to represent the Defendants in the said application listed on 10.10.2023.

In addition to that, we request clarification from the Hon'ble Court regarding the type of evidence required to establish the efforts of the Defendants in securing alternative legal representation.”

11. Since the email came from the “Legal Department”, I infer that, notwithstanding its terms, it would have been clear to the lawyers in the Legal Department what evidence would have been appropriate to show that the Defendants had made efforts to secure alternative representation. The Court declined to continue the correspondence in advance of the hearing but did point out in a final email on that afternoon that:
- The rules only provide for an employee to represent a company.
 - A foreign lawyer has no right of audience unless he is authorised to conduct litigation in the High Court of England and Wales.
 - The Court has an inherent discretion to grant a right of audience in relation to particular proceedings but in considering whether to exercise its discretion will be mindful of the statutory scheme for the granting of the rights of audience and the public interest that lies behind it.
12. On Tuesday 10 October 2023 the Claimants were represented by counsel and their solicitors were also in Court. The only person who was in Court for the Defendants was Mr Nayar. The Court addressed first the issue of whether he should be granted a special right of audience and declined to do so for the reasons set out in the ex tempore judgment given on 10 October 2023. The Court then heard submissions from counsel for the Claimants on the Defendants' application to adjourn the trial and delivered an ex tempore ruling refusing the application.
13. Mr Nayar remained in Court until the judgment on the application to adjourn had been given. The Court then stated that it would rise for the short adjournment and discuss after the short adjournment how the trial would proceed in light of the judgment. However, at 2pm after the short adjournment, Mr Nayar had not returned and no-one was in Court (or on the remote link) who purported to act or to represent in any capacity the Defendants.
14. Given the time difference with India (4 ½ hours ahead) and thus after close of business in India, and anxious to give the Defendants an opportunity to participate in the trial, the Court then directed the Claimants' solicitors to send an email to the First Defendant's Legal Department, informing them that the hearing would continue on the morning of

Wednesday 11 October 2023 at 10:30, but if they did not attend the hearing, it may well continue in their absence.

15. At 9:29 on 11 October 2023, an email response was sent by the Legal Department of the First Defendant to the Claimants' solicitors, copied to the Court. It stated in material part that since the Defendants did not have legal representation and Indian counsel did not get permission to represent the Defendants, the Defendants "*have no ability to conduct a trial without adequate legal assistance and representation*". The Defendants also requested "*guidance from the Claimants to aid and guide us in such foreign proceedings which are totally unfamiliar for the Defendants*".
16. I note that notwithstanding the fact that India is more than 4 hours ahead of the UK and thus its working day had commenced much earlier, this request to the Claimants' solicitors was only sent shortly before the Court hearing. I also note that the Defendants had been acting in person since 26 September 2023 and had been contacted by the Claimants' solicitors on several occasions prior to the trial concerning the arrangements for the trial (e.g. regarding bundles and the giving of evidence by their witnesses) but at no point had the Defendants indicated a need for guidance from the Claimants' solicitors.
17. Having discussed the matter with counsel for the Claimants, the Court accepted that a response should be sent to the Defendants' Legal Department by the Claimants' solicitors to clarify the position. That was sent at 11:17 and read, so far as material:

"The judge this morning in Court has made clear that there is nothing stopping the Defendants from attending this trial. As you know, the Defendants can attend this trial remotely, subject to sending the attached undertaking to the Court, which you have already received. The Defendants are fully able to attend this trial remotely and also call their witnesses.

The judge has also made clear that this is an entirely separate question from that of your legal representation at this trial. In this regard, the judge has this morning set out that this is the Defendants' last opportunity to put forward an employee or director of the Defendants to represent them at this trial. The judge has made the observation in Court that the Defendants are sophisticated litigants in person with their own legal department, who will have been involved in other litigation before, and so adducing a representative of the Defendants will not be a difficult thing for the Defendants to do, if they wish to, and if they wish to participate in this trial."

18. The Legal Department at the First Defendant responded at 12:00 noon requesting the link to the hearing. It also said:

"...The Defendants are without attorneys and not well versed with the procedure and next course of hearing. In this light you are also requested to kindly aid the Defendants and appraise us in understanding the policies, the procedures, the system of evidence undertaking for smooth conduct of the proceeding.

In addition we also write to bring to your notice that the Defendants will not be able to join the hearing at this short notice. Please also let us know the documents and evidence required for a representative of the Defendants to join these proceedings."

19. Again I note that in the days leading up to the start of the trial the Defendants had been sent the undertakings required by the Court in order to access the trial remotely but had not responded. Further in correspondence with the Claimants' solicitors in the lead up to the trial, the Legal Department had not raised any issues concerning the procedures or system of evidence. There had been a PTR in May 2022 (prior to the trial which was adjourned) and this had made provision for evidence by video link for the witness of both sides including by reference to an annex prepared for the Defendants. That order remained effective.
20. In response to the email at noon, the Court re-sent the link to the hearing to the Legal Department, and the Defendants were told that the hearing would resume at 2:00pm. In a further email from the Claimants' solicitors, it was noted that the judge had also said that any assistance that the Defendants may require as litigants in person would be given to them in the usual way in the course of the trial.
21. Shortly before the hearing was due to resume at 2:00pm, the Legal Department responded that the Defendants would not be able to join the hearing scheduled for 2:00 at "*such short notice*". It was also stated that it was beyond the working hours for the day in India and the office of the Defendants was already shut. It was further requested to "*indicate as to who can join the hearing for tomorrow and what kind of authorisation is required for proper representation.*" It was then requested that the hearing be adjourned and scheduled for tomorrow "*in order to provide time to the Defendants to arrange for the requisite documents and for an employee to represent the Defendants.*"

Discussion

22. CPR 39.3 provides that the Court may proceed with a trial in the absence of a party. In deciding whether to proceed in the circumstances of this case, I have regard to the overriding objective, and also to the Court of Appeal decision in *Williams & Anr v Hinton & Anr* [2011] EWCA Civ 1123:

"It is of course of the first importance that a party is afforded a fair opportunity to present its case to the judge. It is also, however, of great importance that judges, as a matter of case management, act robustly to bring cases to a conclusion. In the present context CPR 39.3 furnishes a safeguard in the event of mishap."

23. The Defendants are companies who together borrowed or guaranteed amounts in excess of \$1 billion. I infer that the Defendant companies are sophisticated entities and, through the Legal Department of the First Defendant, are fully aware, both from the emails sent by the Claimants' solicitors and from Mr Nayar, that the application to adjourn the trial was refused and the trial would be going ahead today, Wednesday.
24. I note that the First Defendants has a legal department which has been in communication with both the Court and the Claimants' solicitors, both in the days leading up to the start of the trial and during the course of the day today. I have no evidence as to the experience of those employed in the Legal Department but at no point prior to the trial has the Legal Department sought guidance from the Claimants on the procedure as a prerequisite to the Defendants' participation in the trial. In fact the correspondence from the Legal Department since the application to adjourn was refused and purporting to require assistance/information is to be contrasted with the absence of engagement prior to the trial. I note that the application to

adjourn was made very late and without prior notice to the Claimants. In the circumstances I infer that the Defendants had adopted a strategy to adjourn the trial and now that strategy has failed, the Defendants seek other means to delay or thwart the trial.

25. The Court has taken reasonable steps to accommodate the Defendants -it adjourned the trial on Tuesday afternoon to allow the Defendants time to react to the dismissal of the application to adjourn (albeit that this should have been an outcome which they had considered). The Court further delayed the trial on Wednesday morning to allow the Defendants an opportunity to appear via the remote link.
26. When warned on Tuesday afternoon that the Defendants risked losing the opportunity to present their case, the Defendants originally sought to assert that they could not conduct the trial without legal representation and they required guidance from the Claimants. Although the Defendants no longer have English representation by counsel or solicitors, having parted company shortly before trial, it would appear that Mr Nayar is an experienced litigator in India, who has also, according to public sources, worked at an English law firm, albeit that he is not qualified to practice in England. Given that the Defendants wanted Mr Nayar to represent them on the adjournment application and make submissions to the Court on their behalf, it seems unlikely that he could not and has not provided advice to the Defendants on the conduct of these proceedings and the implications of not attending the trial. Even if I were wrong on that and the Defendants' Legal Department did, indeed, require any guidance from the Claimants' solicitors, the consequences of not appearing and the route open to the Defendants to appear at the trial have now been reiterated in the correspondence from the Claimants' solicitors during the course of the day.
27. There continues to be no explanation as to why (since Mr Nayar left the Court on Tuesday lunchtime) no-one has appeared at Court (either in person or by the remote link) for the Defendants to explain any difficulties or seek the assistance of the Court within the deadlines set by the Court. If the Defendants were genuinely in any difficulty one would have expected someone for the Defendants to have appeared via the link. It is wholly unclear why for example, a member of the Legal Department was not put forward to represent the Defendants and I do not accept that the Legal Department required advice as to the evidence it should provide as to due authorisation. The Court has directed the Defendants to the relevant rules concerning representation by an employee and it is of course for the Defendants, notwithstanding that they are litigants in person, to read the Civil Procedure Rules. As to the question of the internal authorisation of an employee who could represent the Defendants, that is a matter for the Defendants themselves and their own internal procedures and not a matter on which they require advice from the Claimants.
28. I do not accept the time difference between England and India as a valid reason for not attending the trial on Wednesday afternoon given that the Court had made it clear that it would proceed at 2pm. It has always been a feature of this trial that it would take place during normal Court sitting hours in England. No application was ever made to vary the sitting hours of the trial to take account of the time difference with India and thus the Defendants would always have been obliged to participate outside working hours in India.
29. The Claimants were obliged to accept the first adjournment of this trial in 2022. They resisted a further adjournment of the trial in 2023, which they rightly saw in my view, as a tactical measure. Through the correspondence this morning (Wednesday), the Claimants have sought

to answer the queries raised by the Defendants and the Defendants have, in my view, deliberately sought to avoid appearing and thereby indirectly to achieve the adjournment of the trial which they were refused yesterday. I am in no doubt that, in the circumstances, the Defendants have deliberately absented themselves from the hearing today and, by their continued correspondence, merely seek to waste both the Court's time and the Claimants.

30. In my view, for the reasons referred to above, it is appropriate to proceed with the trial in the absence of the Defendants and it would not be in furtherance of the overriding objective to delay the start of the trial any longer. I therefore determine to proceed in the absence of the Defendants and will invite the Claimants to prove their case and tender their evidence.
31. I draw the attention of the Defendants as litigants in person to the safeguards which are built into CPR 39.3 and in respect of which they could seek legal advice, should they so choose, in relation to any judgment which may ultimately be given against them.