Neutral Citation Number: **[2023] EWHC 2559 (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: **10 October 2023**

Before :

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

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Between :

Bank of Baroda and others	**Claimants**
- and -	
GVK and others	**Defendants**

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- -

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

Hearing dates: **10th October 2023**

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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 DBE **Tuesday, 10 October 2023**
(**12:13**pm)

Judgment by **DAME CLARE MOULDER DBE**

1. This is the Court's ruling on the Defendants' application to adjourn the trial in this matter which is due to begin today, Tuesday 10 October 2023 (9 October being a reading day). The Defendants' application is dated 5 October 2023, but was received by the Court office on the afternoon of Friday, 6 October 2023.

2. The application is supported by a witness statement of Kartik Nayar, an Indian lawyer, for the Defendants.

3. In response, and in his opposition to the application, I have a witness statement from the solicitors acting for the Claimants, Mr Bhattacharyya, a partner at Reed Smith LLP ("Reed Smith").

4. The Claimants have been represented today by counsel, Ms Vora. The Defendants are not represented, the Court having refused permission for Mr Nayar to address the Court. He did not have rights of audience and the Court declined to exercise its discretion to grant rights of audience in the particular case for the reasons set out in the ruling.

Background

5. The background to this application is that the trial was originally scheduled for 13 June 2022 and was adjourned by Cockerill J. When adjourning the trial, Cockerill J set out the timetable going forward for the evidence on Indian law. The order made provision for an expert report from Justice Sen for the Defendants, a report for the Claimants and then for a joint memorandum. The original timetable provided for the joint memorandum to be produced no later than December 2022.

6. After that timetable had been fixed, at various points in the intervening period, consent orders were agreed which varied and extended that timetable. Initially, a revised timetable was proposed by the Claimants in September 2022 in light of the fact that the trial had then been re-fixed for October 2023. This moved the overall timetable for the provision of the Indian law expert evidence, starting with the Claimants' expert evidence to be provided in January 2023, and ending with the joint memorandum in March 2023.

7. There was then a counter-proposal by the Defendants, which extended the timetable further, moving the joint memorandum out to June 2023. A consent order moved it out further, such that the joint memorandum was then due by 20 September 2023.

8. In August 2023, there was further correspondence resulting in a consent order of Dias J and this moved the joint memorandum to be produced no later than 2 October 2023.

9. At the end of August 2023, at a time when the Defendants were still represented by Norton Rose, there was further correspondence between the solicitors for both parties. Norton Rose proposed an extension of time to serve the Defendants' rebuttal expert report on Indian law and also proposed an extension for the production of the joint memorandum to 4 October

2023. However, when the consent order was submitted to the Court, the judge in question indicated that he was not minded to extend the deadline for the joint memorandum, given the imminent trial. Accordingly, the deadline for the joint memorandum was unchanged and remained at 2 October 2023.

10. On 11 September 2023, the Defendants filed their rebuttal expert report and on 19 September 2023 the Claimants' solicitors wrote to the Defendants' solicitors seeking to file a rebuttal expert report. (Such a report was originally contemplated but had been omitted in the various consent orders and timetables that had been agreed subsequently.) The Claimants' solicitors wrote that they wanted to issue a responsive expert report to deal with new points and authorities which had been referred to in Justice Sen's rebuttal report. The Claimants' solicitors proposed that such a rebuttal report would be filed by 27 September 2023.

11. In correspondence on 22 September 2023, the Defendants replied, through Norton Rose, seeking to impose conditions in response, including that in the event the joint memorandum could not be prepared by 2 October 2023, the trial should be adjourned "*for a reasonable period*" to allow for the completion of the filings.

12. Reed Smith rejected this in their response on 26 September 2023 to the Defendants in the following terms:

> "*There is and will be no prospect whatsoever of any adjournment in this litigation, especially given last year's adjournment, and where the parties have been very well aware of the approaching Court deadlines for a significant period of time, including 2 October 2023 deadline to serve the Indian law experts' joint statement. Our clients will be complying with the 2 October date and we expect your clients to also comply, as required by the Court's order.*"

13. The Defendants then wrote to the Claimants on 2 October, seeking an extension with regard to the filing of the joint memorandum, on the basis that the draft joint memorandum filed by the Claimants on 2 October had not been agreed by the Defendants' expert and no discussions had taken place between the experts.

Relevant law

14. The relevant law in relation to an adjournment is set out in CPR 3.1(2)(b):

> "*Except where the rules provide otherwise, the Court may adjourn or bring forward a hearing.*"

15. The White Book paragraph 3.1.3 states that:

> "*In determining whether to grant an adjournment the Court must have regard to the overriding objective. Accordingly the Court should deal with the appellant's case in a manner which saves expense, is proportionate to the amount of money involved, and allocates to it an appropriate share of the Court's resources. Boyd & Hutchinson v Foenander [2003] EWCA Civ 1516.*"

16. It is clear, therefore, that the Court has power to adjourn the trial and that the decision whether to adjourn must be exercised in pursuance of the overriding objective. The overriding objective is to enable the Court to deal with cases justly and at proportionate cost.

17. CPR 1.1 (2) provides:

> "*Dealing with a case justly and at proportionate cost includes, so far as is practicable—*
> *(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence*;
> *(b) saving expense;*
> *(c) dealing with the case in ways which are proportionate—*
> *(i) to the amount of money involved;*
> *(ii) to the importance of the case;*
> *(iii) to the complexity of the issues; and*
> *(iv) to the financial position of each party;*
> *(d) ensuring that it is dealt with expeditiously and fairly;*
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and*
> *(f) enforcing compliance with rules, practice directions and orders.*"

18. Counsel for the Claimants referred to a number of authorities, of which I note in particular *Bilta (UK) Ltd (in liquidation) v Tradition Financial Services Ltd* [2021] EWCA Civ 221 at [30]:

> "*The guiding principle in an application to adjourn is whether progressing with the trial will be fair in all the circumstances, that the assessment of what is fair is a fact-sensitive one and not one to be judged by the mechanistic application of any particular checklist*."

19. Counsel for the Claimants also relied on *Original Beauty Technology Company Ltd v G4K Fashion Ltd* [2021] EWHC 2632 Chancery at [10], where the Deputy judge referred to Coulson J (as he then was) in *Fitzroy Robinson* and the guidance provided on adjournments:

> "*The adjournment of a trial with fixed dates should be a last resort. For a very late application the Court should have specific regard to the parties' conduct and reasons for delay, the extent to which the consequences of the delays can be overcome before trial, the extent to which a fair trial may be jeopardised by delays and the consequences of an adjournment for the parties and the Court*."

The Adjournment Application

20. By its application, the Defendants state that they seek an adjournment of the trial "*for a short period of time*" so as to be able to secure alternate legal representation and to ensure that the filing of the joint memorandum can take place and that the Indian law expert of the Defendants can be available.

Defendants' submissions

21. The Defendants' submissions I take from the application and the supporting witness statement and were as follows.

22. Firstly, the timelines as originally fixed in the present proceedings have been substantially delayed by the Claimants, seeking one extension after another.

23. Secondly, it is owing to the said delay in the filings by the Claimants that eventually the date of filing of the joint memorandum was required to be shifted to 2 October 2023, after accounting for a short extension by the Defendants.

24. Thirdly, on 19 September 2023 the Claimants wrote to the Defendants seeking to file a rebuttal expert report, which was a filing that was not originally contemplated, and until at least 26 September, there was no clarity with regard to the filing of that expert report. And from 28 September 2023 until 2 October, there was a long weekend in India with only one working day in between. As a result of which, the joint memorandum could not be agreed by the Indian experts or filed in the Court.

25. Fourthly, thereafter, the Defendants' expert, Sen J, communicated his unavailability to the Claimants' expert owing to certain "*medical exigencies*" that would not allow the Defendants' expert to discuss the draft until at least the end of the present week, and that it was in this context that the Defendants wrote to the Claimants on 2 October 2023 seeking an extension with regard to the filing of the joint memorandum, as the draft filed by the Claimants had not been agreed by the Defendants' expert and no discussions had taken place. The Defendants stated that, since the Claimants had indicated that the deadline could not be extended, then the Defendants were seeking to adjourn the trial.

26. Further, for reasons stated to be "*beyond the control of the Defendants*" the Defendants have not been able to seek alternative legal representation.

27. In conclusion, the Defendants say that, in the circumstances and keeping in mind the principles of natural justice, they seek an adjournment of the trial so as to be able to, secure alternate legal representation, to ensure that the filing of the joint memorandum can take place, and that the Indian law expert of the Defendants can be available.

28. It was submitted for the Defendants that the Defendants would suffer "*irreparable harm and injury*" if the adjournment is not granted, whereas if the Claimants eventually succeed in their claim, the Claimants will be entitled to interest and, as such, will suffer no loss owing to any adjournment.

Claimants' submissions

29. For the Claimants, it was submitted that this is the Defendants' second application to adjourn the trial, having already succeeded on an application to adjourn last year, also made at the last minute, following which the trial was pushed back from June 2022 to October 2023. It was submitted that a joint memorandum of the experts is a desirable document, but not a necessary one. Even if the Defendants' expert was unable to engage in discussions in the lead-up to the joint memorandum, his opinion as summarised from his own reports and accompanied by paragraph numbers ensure the Defendants are not prejudiced.

30. As to the background of the exchanges between the expert judges, the Claimants submitted that, initially, on 27 September, Justice Sen appeared enthusiastic in his response, but that

enthusiasm appeared to dwindle and moved from wanting to agree a time on the next day, to his inability to turn his attention to the joint memorandum on account of professional commitments, to illness, where the relevant email said he had been ill for a fortnight.

31. It was submitted for the Claimants that the Defendants are equally, if not more, responsible for the long-drawn-out timetable, since the last trial was adjourned. The Defendants could have raised concerns about the tight deadline but chose to wait until 5 October 2023 to make the adjournment application. Any reliance on public holidays in the period from 28 September to 2 October is irrelevant. It was submitted that this should have been foreseen by the Defendants and, further, that the 29 and 30 September were working days in India.

32. It was submitted for the Claimants that putting blame on the Claimants in relation to the filing of the rebuttal report by the Claimants is without merit. It was originally contemplated by Cockerill J in her order. It was not in the amended timetable fixed through correspondence but did not result in any lack of clarity, given the terms of the response from the Claimants' lawyers.

33. It was submitted for the Claimants that it is unclear whether the Defendants are suggesting that Justice Sen was unwell and not available to discuss and file the joint memorandum, or so unwell that he would be unable to give video evidence. It was submitted that no evidence of any medical exigency has been forthcoming.

34. It was submitted that the Defendants have a history of changing legal teams. They previously disengaged Addleshaw Goddard before the PTR, which took place before Andrew Baker J last year. When this was raised by him at the PTR, counsel for the Defendants said that this was due to "*a loss of confidence.*"

35. It was submitted that there is no evidence before the Court as to why Norton Rose have now been removed from the record, approximately two weeks before the trial, and there is no evidence of what steps the Defendants have taken to try and secure alternate legal representation.

36. Counsel for the Claimants referred the Court on the issue of natural justice and fairness raised by the Defendants to the decision of Henshaw J in *Barclays Bank Plc v Shetty* [2022] EWHC 19 at [50]. Counsel for the Claimants submitted that in *Barclays*, where circumstances were similar to the case in hand, Henshaw J, at [70], declined to accede to the respondent's adjournment application on the basis that he was not satisfied that the onus of establishing that it would be unfair was met.

37. Finally, it was submitted that the Claimants ought not to be kept out-of-pocket any longer. There is a very significant amount of money at stake in this litigation, and this must be viewed against the background of increasing interest rates.

Discussion

38. In my view it is clear that the trial cannot be adjourned for a "*short period of time*". If an adjournment were to be granted, the trial window will be lost and I understand that the next available date for an eight-day trial according to the Listing Office is in 2025.

39. I note that the Defendants have said that they want to secure alternative legal representation and in an email to the Court on 27 September 2023, with its notice of change of solicitor, the Defendants said they would be "*actively seeking legal representation*" but no evidence has been put before this Court of any steps that may have been taken by the Defendants.

40. Further, no explanation has been advanced by the Defendants as to why the application to adjourn was only made on 5 October 2023, immediately before the pre-reading for the trial was due to start. The notice that the Defendants would be acting in person was filed on 26 September 2023 and assuming the Defendants had taken the decision to part company with Norton Rose at some point prior to that, this means that they had at least two weeks to look for new counsel or to have sought an adjournment. I note in this context that the Defendants have previously changed lawyers at short notice and this led to the adjournment of the trial in 2022.

41. In relation to the impact of the rebuttal evidence which the Claimants sought to adduce, it seems to me that the parties had enough time to co-ordinate and draft the joint memorandum before the agreed date of 2 October 2023 and I am not satisfied, having looked at the correspondence, that the proposed rebuttal evidence on the part of the Claimants caused either delay or confusion to the Defendants. The letter of 26 September 2023 is clear that it rejected the proposal for an adjournment and there was nothing in the correspondence on the part of the Claimants' solicitors which could be said to have caused delay or confusion to the Defendants.

42. As to the availability, or otherwise, of the Defendants' Indian counsel, there is no evidence before this Court that Justice Sen is unable to attend the trial. The witness statement filed in support of the application for an adjournment does not go so far as to indicate this. It refers, somewhat opaquely, to whether or not the expert witness "*can be available*." No medical evidence has been filed and the Court is left with the somewhat contradictory email exchanges. As noted by counsel for the Claimants, in the original correspondence on 27 September 2023, the Claimants' expert proposed a call to discuss the joint memorandum. Justice Sen responded on the same day, but then on the following day, 28 September, referred to existing work commitments:

> "*I have not been successful in extricating myself from my commitments today. I certainly will not be free until Monday from my arbitral hearings. We will have to find some commonly available time at the earliest*."

43. Then on 2 October 2023, Justice Sen J stated that he had been ill for a fortnight but seems to imply that he will be able to address the matter later that week:

> "*I have just noticed your email of yesterday. Unfortunately, I have been unwell for the last fortnight.*"

He refers to having undergone a test under the supervision of a doctor, and the report being awaited. He concludes:

> "*I will be in a position to peruse your email only later this week*."

44. The Indian law evidence is clearly of great potential significance to this trial. The Defendants rely on Indian law in a number of respects as part of its defence. The Claimants' skeleton for the trial challenges the Defendants' Indian law evidence in several key respects.

45. As to the fact that the Claimants have filed a draft of the joint memorandum, a step to which the Defendants have objected, it seems to me that no particular weight should be given to this draft in deciding whether or not an adjournment should be granted. Such a draft joint statement does not, of course, bind the parties: CPR 35.12.5.

Conclusion

46. The Court has to decide whether or not to grant the adjournment by reference to the overriding objective, ensuring that the matter is dealt with expeditiously and fairly. The Court notes that an adjournment would necessitate further Court time being allocated to this claim at a time when the pressure on Court time is considerable as demonstrated by the next available trial window being only in 2025. The delay that would result from an adjournment is also relevant to the issue of fairness: the Claimants are entitled to have the matter dealt with expeditiously. This would be the second adjournment of the trial and although the Court could make an order for the costs thrown away by any adjournment to be paid by the Defendants, such an order is unlikely to result in full payment of the costs which the Claimants will have incurred and which would be wasted by an adjournment at this point. I accept that interest will continue to accrue on the outstanding amount. I note that interest rates have now risen and that the additional interest will increase accordingly. It seems to me that this cuts both ways; whilst ultimately it might compensate the Claimants, equally, the amount claimed is already very significant and a delay will only increase the amount payable, if so found, by the Defendants and a further delay could, therefore, affect the prospects of ultimate recovery.

47. The Court has to consider fairness to both parties: *Bilta* at [49]. As to fairness to the Defendants, in relation to the joint memorandum, there is no evidence that Justice Sen J is not available at all. The Defendants have not presented further evidence as to his medical condition, despite the apparent contradiction in the correspondence being raised in the Claimants' skeleton.

48. The finalised joint memorandum is of little weight in relation to the question of adjournment. The joint memorandum is intended for the benefit of the Court. It helps to identify the points of difference. The Court has expert reports from both experts and will hear oral evidence. The Claimants' expert has sought to identify the areas of difference and agreement and the absence of the finalised joint memo cannot be regarded as fatal; see the White Book at 35.12.2 and the authorities referred to.

49. Moreover, Justice Sen , in his email, indicated that although he had been ill, he would be able to look at the email by the end of last week. I have no evidence as to his medical condition presently beyond the email correspondence. However the email correspondence before me would suggest that he could now review the joint memorandum and, in my view, there is time for Justice Sen to review the joint memorandum if he has not already done so. His evidence is currently timetabled to take place one week today, on 17 October 2023. I see no reason why there could not be a call in the intervening period or, alternatively, if necessary, the issue of agreement or disagreement on individual points can be dealt with in cross-examination.

50. Turning to the lack of representation, the issue here is fairness, and I am mindful of the authorities reviewed by Henshaw J at paragraphs [46] onwards in *Barclays Bank v Shetty*. The Defendants do not obviously have to disclose privileged matters to the Court, but this is the second time that they have parted company with their solicitors shortly before the due date for trial. In my view, at the very least, this increases the need for careful scrutiny by the Court of the circumstances and reasons now advanced by the Defendants for seeking an adjournment.

51. The Defendants appear to have chosen to give no evidence as to why they have parted company with their solicitors and counsel and no evidence as to what steps, if any, they have taken to find alternative representation over the past couple of weeks. I accept the submission for the Claimants that the evidential gaps in this application do call into question whether the Defendants have a genuine concern of prejudice, or whether this application to adjourn is in fact a tactic on the part of the Defendants to put off the trial for many months to come. The Defendants are sophisticated litigants. I have no evidence which would suggest that they are in any way constrained by their financial situation from instructing lawyers. They have had the benefit of legal advice in England more or less throughout the proceedings and, it would appear, have also had the benefit of legal advice in India. Against that background, I infer that the Defendants could have adduced the necessary evidence certainly as far as seeking alternative representation and have chosen not to do so.

52. This is a case which, as far as the defence is concerned, may well turn largely on the Indian law expert evidence. However, the reports are before the Court. There is no reason why the experts cannot be called to give oral evidence and there is no need for experts as to foreign law whose overriding duty is to the Court (CPR 35.3) to be cross-examined as if they were witnesses of fact. The Court can scrutinise the expert evidence to see whether the Claimants' case is made out. If the Defendants are unrepresented, Counsel for the Claimants will obviously have an obligation of fair presentation: see *GASL v SpiceJet* [2023] EWHC 1107 (Comm). As a litigant in person, the defendants can act through a director or an employee to represent the company and ask questions of witnesses, including the expert witnesses, subject to the consent of the Court in accordance with the Commercial Court Guide (M3.1) and the Court has made aware the Defendants aware of this provision in correspondence last week. In this regard I infer that the Defendants who have been communicating through the legal department of the First Defendant (but without identifying any individual lawyer) are sophisticated litigants who may well be capable of acting in person.

53. Against that background, in my view, it cannot be said that the lack of representation would result in unfairness to the Defendants amounting to a breach of natural justice. The Defendants have provided no evidence to persuade me that the position is anything other than of their own making in the circumstances: see *Bilta* at [51].

54. For all these reasons, in my view, the circumstances of this case are such that it would not be in furtherance of the overriding objective to allow an adjournment and the application for an adjournment is therefore refused.