Ref. HT-2022-000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION (KBD)
[2024] EWHC 1237 (TCC)

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MRS JUSTICE JEFFORD

IN THE MATTER OF

LLOYDS DEVELOPMENTS LIMITED (Claimant)

- v -

ACCOR HOTEL SERVICES UK LIMITED (Defendant)

MR J BOWLING, instructed by Spencer West LLP, appeared on behalf of the Claimant
MR R BLACKETT, instructed by Haynes & Boone CDG LLP, appeared on behalf of the Defendant

JUDGMENT
9 MAY 2024
(AS APPROVED)

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MRS JUSTICE JEFFORD:

1. In July 2022 there was an application by Accor for security for costs which was heard by O'Farrell J on 8 July 2022. The application for security was in the sum of £1.5 million. At the time of the application, Mr Esly provided a witness statement which estimated the defendant's costs through to trial at a little over £2 million. As a check on the amount of security that should be ordered, O'Farrell J carried out an exercise akin to a cost budgeting exercise and, having done so, fixed the total amount of security at £1.5 million as Accor had asked.

2. At the conclusion of her judgment, she provided, as is common, for the security to be provided in tranches. The first tranche was £300,000 to be paid by 29 July; the second was £600,000 to be paid by 7 October 2022 which was intended to be shortly before the CMC. She then said this:

> "That would leave the final tranche of £600,000 to be made before trial. I agree that six weeks before trial makes sense given the likely length of the trial and, therefore, the time at which the costs of preparation are likely to be incurred, and the precise timing of that can be determined by the court at the CMC once the trial timetable has been established."

3. Her subsequent Order reflected that order for payment in tranches and expressly provided that the final £600,000 should be paid by 4pm on a date six weeks before trial, such date to be determined at the first case management conference on 14 October 2022.

4. That case management conference was heard by HHJ Kelly and at, or shortly after, that case management conference a date of 11 March 2024 was fixed for trial. It is not in dispute that the effect of O'Farrell J's judgment and Order at that point was, therefore, that the £600,000, the last tranche of security, became payable on 29 January 2024.

5. On 1 December 2023, Waksman J vacated the trial and as yet no new trial date has been fixed. That led in January 2024 to two applications.

6. The claimants made an application dated 22 January 2024 in which they asked for an order varying the order of O'Farrell J so as to clarify that the claimants are required to pay the third tranche of security by a date six weeks before the actual date of trial; alternatively, varying the order so as to provide the claimants are required to pay the third tranche of security by a date six weeks before the revised date of trial in view of the postponement of the trial.

7. The following day, the defendants issued an application for various declarations. Leaving out of account those that are irrelevant to this present issue, they asked for an order, pursuant to CPR 3.1(2)(c) and the court's inherent jurisdiction, that the claimants' claim be struck out unless the claimants gave security for the defendants' costs by paying £600,000 into the Court Funds Office by a date to be decided. The premise of that application seemed to be the assumption, in light of the application made the previous day, that the claimants would not pay the amount of security by 29 January but seeking an unless order for payment of that amount by a subsequent date.

8. What underlies that application is the submission that has been made to me that O'Farrell J's Order is unaffected by the postponement of the trial date. She fixed a date for payment which was to be six weeks before trial, that date to be determined at the first case

management conference on 14 October. Once the date had been determined at the case management conference and determined as 11 March 2024, that was, so to speak, that. There was a date for payment.

9. The contrary argument advanced by Lloyds is, in effect, that the date for payment was a floating date, that is six weeks before when trial actually is, or, in the alternative, that the order should be varied to have that effect.

10. As a starting point – and it is a starting point – in my judgment the combined effect of O'Farrell J's Order and the fixing of the trial date was, as Accor submits, to fix a date for payment of the last tranche of £600,000 and not a floating date.

11. I have some sympathy with Mr Blackett's argument that the £600,000 is security and part of the security that was ordered whenever it is paid; that if it should have been paid on 29 January, that would be that; and that if he wanted any more he would then have to make an application for further security. Thus the proper course would be to leave O'Farrell J's Order, as I have construed it, wholly unaffected. Despite the sympathy that I have with that submission, it nonetheless seems to me that the clear intention of the judge was to order that tranche of security to be paid about six weeks before the trial, reflecting what she had said in her judgment about the costs that would be incurred in preparation for the trial.

12. Were there not anything more to be said, I would have varied O'Farrell J's Order in the manner asked for by Lloyds to provide that that last tranche should be paid six weeks before the date of the actual trial, that is a date yet to be fixed given the postponement of the trial.

13. However, that is not an end to the matter because Mr Blackett relies on his application for payment of the £600,000 also on the basis that there has been a significant increase in costs incurred by Accor above and beyond the estimates that were before O'Farrell J and that the court should either leave the Order untouched to achieve the effect of payment of additional security or vary it so that additional security should be ordered to be provided.

14. Although the application may not have been expressed in those precise terms, that slightly different way of putting the case seems to me to fall within the terms of the application asking the court to order the payment of £600,000 by a date to be fixed and to do so in accordance with the court's inherent jurisdiction which it seems to me I should consider exercising given that the matter is before me and has been fully argued.

15. As I have already said, O'Farrell J had before her a budget of about £2 million. Accor asked for £1.5 million and, having done the budget check, she ordered security in the total amount of £1.5 million. That is, if the accurate figures are used, an order for the payment of security at 74% of the total estimated expenditure.

16. The two tranches already paid, £300,000 and £600,000, would have meant, had there been no adjournment, that £900,000 of security would have been paid before what I might call the pre-trial preparation period and those two tranches would, therefore, have covered, amongst other things, disclosure, witness statements and experts' reports. In his 11th witness statement in support of Accor's application, Mr Esly says however that Accor has already incurred significantly more than that £900,000 for which they have security. I am going, in the course of this judgment, to use round figures rather than the detailed figures that are set out in Mr Esly's statement and in round figures the total amount that has been expended already, that is by 1 January 2024, is £1.8 million.

17. If the 74% figure is applied to that £1.8 million of actual expenditure, it generates a figure of about £1.4 million. There is, therefore, an unsecured gap between the security that has been paid into court and the percentage adjusted amount of costs which Accor has incurred. On those broad brush figures, that figure is about £500,000. In Mr Esly's witness statement, applying a rather more detailed approach, his figure is £437,000 but that is the area of the gap to be considered.

18. The total costs thus far incurred are £2.4 million but about £580,000 worth of that has already been dealt with in applications in which costs orders have been made, including the £120,000 that was paid seven days after the date in the unless order and for payment of which I gave an extension of time. Thus the £1.8 million comes, roughly speaking, from deducting £600,000 from £2.4 million.

19. Although there has already been that significant amount dealt with in costs orders made on previous applications, the new Precedent H which has been provided – and there are two versions with two slightly different figures for reasons that have been explained to me – show that more than £920,000 has been spent by Accor on interim applications. Therefore that leaves about £340,000 expended on applications, and what might have followed the applications, which falls to be dealt with as costs in the case as it has not been the subject matter of any distinct costs order. That serves to indicate where there is a significant difference in what might have been expected to be incurred, since the figures before O'Farrell J included nothing for interim applications, and the figures for costs that have actually been incurred.

20. There is a significant difference between the actual expenditure on disclosure and the estimated cost of disclosure in the budget that was before O'Farrell J. The estimated cost was a little over £200,000; the actual cost has been over £500,000. In Mr Esly's statement, he considers the issues that have arisen in relation to disclosure.

21. Mr Esly points to a number of applications, which I do not intend to recite, in which the court commented adversely on Lloyds' approach to disclosure. He points to the fact that at the hearing before O'Farrell J, she was told that Lloyds did not expect there to be more than 2,000 emails in the entire litigation. He then says at paragraph 53:

> "To date, Lloyds has produced 58,235 documents, all of them months late."

22. He summarises in a table to his witness statement the serial late disclosure provided and then he says:

> "During October 2023, Lloyds was making informal disclosures via its delay expert of thousands of previously undisclosed documents said to be relevant to delay analysis of Tribe Glasgow (not even Virgin Glasgow) which he had received directly from Lloyds, apparently without the involvement of Lloyds' solicitors and apparently because of the difficulties of locating documents for Lloyds' disclosure."

23. Those matters have been the subject of other applications before me over the past two days but there is no doubt that this was another example of confusion and the unsatisfactory provision of documents as the applications before me have continued to involve applications for further explanation of what was provided and what was not and in what circumstances.

24. At Paragraph 54, Mr Esly also says this:

> "Lloyds' production contains thousands of irrelevant documents, imaged documents … duplicates, near duplicates and documents with missing or inaccurate dating metadata (making it impossible to review Lloyds' disclosure in chronological order). These issues were admitted, albeit downplayed, in a witness statement (Patel 7) dated 27 November 2023 which Lloyds was eventually compelled to produce by an order of Waksman J dated 16 November 2023."

Mr Patel, Mr Esly says, confirmed the dating metadata had been destroyed or altered because of the format in which the documents had been collected which he pointed out was a further breach of HHJ Kelly's Order. He goes on to refer to matters such as the breaking of DropBox links which have been matters raised before me at this hearing.

25. In other words, there is no doubt and there does not, in my view, appear to be any serious dispute that Lloyds' disclosure has been inadequate. The number of documents disclosed has been far greater than anticipated and the manner in which disclosure has been given has not facilitated sensible consideration by Accor.

26. Despite all of that, Mr Bowling submits that the application does not, as he put it, get out of the gates. He points to the fact that later in Mr Esly's statement, he seeks to explain why there is the difference between the estimated costs and the costs actually incurred to date. The reasons referred to at that point in the statement by Mr Esly are the changes in the claimants' case, including the increased quantum, and the postponement of the trial, neither of which, Mr Bowling submits, without more, explain the increase in costs. More to the point, Mr Esly does not relate the increase in costs in any way to changes in circumstance. Paraphrasing Mr Bowling's submission, and reflecting a matter which I raised in the course of argument, there ought to have been, he says, a proper attempt to compare the estimated costs with the costs actually incurred and to explain that increase or its relationship to changes in circumstances.

27. As I observed, it would have assisted me to be able to compare what has actually been incurred with what has been estimated and to understand the difference but, despite that, it seems to me that Mr Bowling's submission goes too far and that to suggest that there is no evidential basis for the court to find that costs have been increased by reason of a material change in circumstances is not a viable or proper approach.

28. Firstly, as I have said, there was nothing in the estimates before O'Farrell J for interim applications. This case has a long history of applications and orders and of non-compliance by Lloyds with orders made against it. Mr Esly's many statements contain an ever-evolving table which sets out those non-compliances and they have been the subject of serious criticism and adverse comment by the court on previous occasions. Correspondingly, there has been no criticism of Accor for making the applications that it has made and no suggestion that Accor has been at fault in making any applications. If there had been, there would have been adverse costs orders against Accor.

29. So it seems to me that it is an entirely proper inference for me to draw, if indeed it is an inference rather than a matter evidenced in a witness statement, that there has been an increase in costs by virtue of the numerous applications that have been dealt with, including for these purposes those that have not been the subject of discrete costs orders but where the

costs will be dealt with as in the case. Similarly, it seems to me that there is clear evidence on which I could conclude that the costs of the disclosure exercise have been increased by matters for which Lloyds are responsible or, as counsel put it, where they should bear the risk.

30. That brings me back to the £600,000 figure in the last tranche of the security which O'Farrell J had ordered. It seems to me that the issue for me should be and is whether I should simply order the payment of that amount by way of additional security at this point, leaving all other matters to be dealt with in any other future application for security, or whether I should order a sum – possibly £600,000, possibly a different figure – to be paid by way of additional security now, at the same time, varying O'Farrell J's order so that the £600,000 tranche is payable six weeks before the actual trial date.

31. In my view, the second of those is the better approach because, despite the view I have formed that there are impacts which the court can clearly discern and take account of in terms of the increase of costs incurred by Accor beyond those estimated by this stage of the proceedings, I still have serious reservations about the level of costs incurred both on the interim applications and on disclosure.

32. So far as the interim applications are concerned, those concerns are strengthened by the vast costs that appear to have been incurred on the various applications that have been before me over the past two days as set out in the statements of costs now before me. These exemplify an approach to all aspects of this litigation which involves the deployment of multiple Grade A fee earners on the same matters, extraordinarily lengthy correspondence, and similarly lengthy statements that, in part at least, duplicate what has been said in correspondence, followed by submissions which revisit the same matters.

33. Without any further analysis, I am not prepared simply to accept the approach suggested in Mr Esly's statement that I should take the so-called gap and order by way of further security a percentage, whether it is 74% per cent or a lesser percentage.

34. The approach I, therefore, propose to take is one which reflects my concerns about the level of costs but to recognise that the £600,000 tranche was one which Lloyds could realistically have expected to pay. I am, therefore, going to order additional security in relation to the costs that have already been incurred in the sum of £300,000. That is half of the £600,000 tranche.

35. There is however, which Mr Bowling recognises is a proper application, an additional matter which is that it is to be anticipated that the defendants will shortly incur further costs in pleading a Re-Amended Defence and Counterclaim and attending a second CMC. The total costs for those two matters are said to be £220,000 for the re-amended pleading and £55,000 for the further CMC, a total of £275,000 for an amended pleading and a case management conference.

36. Mr Bowling has sought to persuade me that the work that will be involved in the Re-Amended Defence and Counterclaim is of very limited compass given the scope of the amendments. Mr Blackett has submitted that the extracts that I have been shown merely, so to speak, touch the surface of what will need to be considered and that I have not even been shown the full extent of the amendments.

37. Nonetheless, it does seem to me that a figure of £220,000 for an amended pleading is one that on the face of it is excessive and what I propose to do, therefore, is take a broad

brush approach to the two figures for the Re-Amended Defence and Counterclaim and the case management conference and order another £125,000 by way of additional security.

38. That gives a total of £425,000 additional security to be paid by Lloyds by way, unless there is some other proposal, of payment into court. Clearly that cannot be treated as a payment that has not been made when it ought to have been made because I have, to that extent, not acceded to Accor's position on the £600,000 tranche. I will, subject to any further submissions, give Lloyds 28 days in which to make that payment, recognising the issues that there have been to date with the administrators and funding. That will have an impact on further steps in the proceedings but, given that it is clear there cannot be a trial until October 2025, that does not seem to me to have a significant impact.

39. So far as O'Farrell J's Order is concerned, as I indicated, I will vary that Order so that the last tranche of £600,000 of the security previously ordered is to be paid six weeks before the date to be fixed for trial at the next CMC. I have no doubt that Accor will say that that figure is now inadequate and will be making an application for a further variation to that Order to increase that amount but that is not a matter that is before me today or that I intend to say anything further about.

This transcript has been approved by the Judge