Ref. HT-2022-000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION (KBD)
[2024] EWHC 1238 (TCC)

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

JUDGMENTS
8th MAY 2024
(AS APPROVED)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Transcribed from the official recording by eScribers Ltd
Ludgate House, 107-111 Fleet Street, London EC4A 2AB
Tel: 0330 100 5223 | Email: uk.transcripts@escribers.net | uk.escribers.net

MRS JUSTICE JEFFORD:

1. The first matter that arises is the costs of the two applications that were in effect dealt with on 22 March and by my judgment handed down on 24 April 2024.

2. Lloyds made an application for an extension of time to comply with an unless order the facts of which are set out in that judgment. The application was made in a manner which I described in that judgment as unsatisfactory. The time for payment of the sums due pursuant to the unless order expired at 4.00 pm on Friday 8 March 2024. At 3.57pm that day Lloyds filed on CE file an application for an extension of time to comply with the unless order. When they did so they failed to give any reasons for the application. They gave their reasons by a witness statement which was filed the following day, that is on the Saturday, on the CE filing system under the heading "Miscellaneous." A revised application notice was also filed. They made no attempt to inform Accor's solicitors as to what they had done and the application that they had made and Accor only became aware of the application when it was referred to in an email from Lloyds' solicitors to TCC listing on the afternoon of 12 March 2024.

3. As I observed in the judgment, the circumstances in which the witness statement was added as it were to the application were unsatisfactory. Lloyds' solicitors appeared to be seeking to lead Accor to believe that the revised form of the application together with the witness statement had been filed at 3.57pm on 8 March when in fact the final form of the application and the witness statement were not what had been filed at that time.

4. In the course of argument on 22 March, Mr Bowling accepted that the costs of regularising that position at least should be visited on Lloyds but he submits that, since he was successful in his application for an extension of time, the order that the court should make should, at worst, be one of costs in the case or defendant's costs in the case. He does not argue that costs should follow the event to the extent that, because he was successful in his application, he should recover his costs.

5. Mr Blackett, however, asks for the defendants' costs. Even though Lloyds were successful in the application, the circumstances in which it was made, he says, should lead the court to exercise its discretion to award him his costs of the application.

6. I am conscious that the normal rule is that costs should follow the event and that it would be unusual for the court to exercise its discretion to order costs to be paid to a party that was unsuccessful, but it seems to me that this is a case in which that unusual order ought to be made.

7. I do not intend to repeat the entirety of my previous judgment but it was clear from the evidence that a deliberate decision was taken not to comply with an unless order. A deliberate decision was taken to make an application, as I put it, almost literally at the last minute. It was then done in a poor fashion which inevitably led to the incurring of further costs which ought to have been wholly unnecessary and it put Accor in a position in which, although they could have consented to the extension of time being made, the very circumstances of the making of the application led them to be rightly suspicious and concerned about the basis on which the application was made.

8. In addition, instead of that then being a single application with a single witness statement, the evidence in support of the application developed between its making and the actual hearing in a way that would also undoubtedly have put the defendant to additional time

and cost expenditure which would have been wholly unnecessary had a proper application been made at an appropriate time.

9. In these unusual circumstances, and taking account of Lloyds' conduct, it seems to me that Lloyds ought to bear the costs, not only their own costs but Accor's costs, of the application to extend time and I so order. In other words, I order that the claimants pay the defendants' costs of the application for the extension of time.

10. Mr Blackett also submits that he ought to have his costs of his application for judgment to be entered which was made at about 4.26pm on 8 March in circumstances where it was clear that Lloyds had failed to comply with the unless order. He says that had Lloyds taken sensible steps to inform Accor's solicitors of what they were doing, had done it correctly, and had, in accordance with CPR Part 27.3, served the application as soon as practicable - which in this case would have been immediately - that application for judgment would not have been issued. It had clearly been prepared in advance and in anticipation of a breach of the unless order. Certainly no criticism could attach to Accor for having prepared the application in advance and issued it as soon as the unless order was not complied with.

11. In the event, as I said, Accor was not aware until 12 March that the application to extend time had been made. Again Mr Blackett says that that shows disregard for the provisions of Part 27.3 and he submits that during the period between 8 March and 12 March when Accor became aware that the application had been issued – even then not because they were told by Lloyds but because they saw reference to it in other correspondence - Lloyds took the risk that Accor would issue an application for judgment to be entered and all the consequential matters that followed. Therefore, he submits that Lloyds should also pay the costs of that application, albeit it was inevitably unsuccessful because the application for an extension of time succeeded.

12. I have considerable sympathy with that argument but it seems to me that it goes to support what I have described as the unusual costs order that I have made on the application for the extension of time and that it goes too far to also order Lloyds to pay the costs of the application which was made for judgment to be entered and which was necessarily unsuccessful. I, therefore, do not make an order that the claimants pay the defendants' costs wasted on that application.

13. There were some small costs incurred on a further application for an unless order which was not in the event pursued because the monies were paid. They were, as I understand it, paid late hence the application for the unless order and, unless Mr Bowling seeks to persuade me otherwise, I should have thought, therefore, that the costs of that application ought to be paid by Lloyds.

(Following further submissions)

14. In relation to WhatsApp messages the claimants have disclosed a series of WhatsApp messages passing between Mr Singh and Mr Diamond which are in what Mr Esly has rightly described as a muddled or jumbled form with redactions which have previously been adversely commented upon by the court, particularly by Mr Justice Eyre, and which make any reading of those WhatsApp messages impossible or incomprehensible. It is now conceded by Lloyds that they should carry out a further review of the WhatsApp, messages to identify those that are relevant and disclose them with appropriate redactions and potentially without this level of redaction.

15. The first issue that arises between the parties is who should review the unredacted documents to determine any issues of relevance or confidentiality or privilege. The exercise has been carried out once already apparently by solicitors. The solicitors say that they can properly carry out that review again but given what was produced at the first time I am not satisfied that that is the most useful or appropriate way forward and instead I am going to order what has been proposed by Accor as one of two alternatives, that is that the WhatsApp messages should be reviewed by an independent firm of solicitors, instructed jointly but at Lloyds' cost, with no previous knowledge of what has been disclosed or not. That exercise should be undertaken to ensure that the WhatsApp messages are properly disclosed.

16. Mr Blackett has not referred to these submissions orally, because I have not invited him to do so, but in his skeleton argument he sets out at some length the risk of confirmation bias, that is unconscious confirmation bias if the exercise is carried out a further time by the same people who carried it out the first time. He refers to what was said by Mrs Justice Cockerill in *Recovery Partners GP Limited v Rukhadze & Others* [2021] EWHC 1621 to the effect that, rather than deciding "clean" if there should be a redaction, a solicitor is left deciding whether they should remove a redaction (in that case one suggested by the client) which gives rise of the obvious danger of confirmation bias. All the more so, I would say, if those redactions were made in the first instance by the solicitors and if the choice as to what to disclose was made by the solicitors.

17. So far as the second issue between the parties is concerned, Lloyds are content to provide a witness statement on a date which I will need to fix providing an explanation of who carried out the searches for the SMS text messages and WhatsApp messages on Mr Singh and Mr Diamond's mobile phones and how these searches were conducted, but they do not consent to include within that witness statement an explanation of how the document, Text.WhatsApp_RD.RS.PDF was created, that being the jumbled document in PDF form which is what has so far been disclosed.

18. Mr Bowling says that there is no utility in including that explanation in the witness statement. It will be overtaken by events and further disclosure of the material and the review which I have just ordered to be undertaken by a third party firm of solicitors.

19. PD 57AD at paragraph 17.1 provides that "Where there has been or may have been a failure adequately to comply with an order for extended disclosure, the court may make such further orders as may be appropriate including an order requiring a party to... (5) make a witness statement explaining any matter relating to disclosure." That provision in paragraph 17.1 is an inclusionary direction not an exclusionary one and, in any event, it seems to me that the order that is being sought falls within sub paragraph 5, that is the making of a witness statement explaining any matter relating to disclosure.

20. The question, therefore, is whether it is relevant, useful and/or proportionate to make the order that Accor seek. In my view it is. The manner in which the document was produced and the extent of the redactions that were made may be overtaken by events but it is still material for Accor to know how this patently inadequate document came to be produced and there may be matters arising out of that which are relevant to other issues arising in respect of disclosure. Accordingly, I will make the order as sought in paragraph 3 of the draft order including sub-paragraphs (a), (b) and (c).

(Following further submissions)

21. The next application is for disclosure of documents referred to in the witness statements of Mr Jacobs, one of the administrators, which were before the court on the application heard on 22 March for an extension of time to comply with the unless order. The particular documents sought - I summarise - are those in paragraphs 8 and 9 of the draft order. The references which have been extracted from Mr Jacobs' statements would, in most instances, appear to be, but are not necessarily, to a document or a collection of documents which amount to the things referred to in those paragraphs.

22. Prior to the hearing of the application on 22 March there was a flurry of witness statements. Mr Jacobs' first witness statement on the application was supplemented by second and third witness statements and there were two further statements from solicitors, all relating to the application and the conduct of the application.

23. Mr Blackett seeks disclosure of the documents, assuming that that is what they are, referred to in Mr Jacobs' statements, pursuant to the guidance in paragraph 21 of Practice Direction 57AD, which provides that "A party may at any time request a copy of a document which has not already been provided by way of disclosure but is mentioned in..." - and then there is a list which includes - "a witness statement".

24. The Practice Direction provides that "Copies of documents so mentioned should be provided by agreement unless the request is unreasonable or there is a right to withhold production." If that agreement is not forthcoming, paragraph 21.4 provides that "The court may make an order requiring a document to be produced if it is satisfied such an order is reasonable and proportionate as defined in paragraph 6.4."

25. It appears to me that the overarching structure of that paragraph is one which assumes that the documents referred to are documents that would have been, or ought to have been, the subject matter of disclosure in the first place. I do not suggest that the paragraph is limited in that way, merely that that gives the flavour of the sort of disclosure that is anticipated by paragraph 21.

26. The documents, if that is what they are, that were referred to by Mr Jacobs are not documents that would have been the subject of disclosure because they were all concerned with the funding arrangements to be put in place, or which it was hoped would be put in place, to allow the administrators to pursue this litigation on behalf of the claimant.

27. Mr Blackett submits, however, that since the documents were referred to in a witness statement the default position should be that they are provided by agreement and, if not, that I should make an order requiring them to be provided. There is nothing unreasonable or disproportionate in making such an order because the documents are likely to be, in fact, of relatively limited compass and would have been available to Mr Jacobs when he was making his statement. That was done not very long ago and producing the documents that he was referring to a little over a month ago would in no way be unreasonable or disproportionate.

28. I have in mind, however, that paragraph 6.4 of the Practice Direction, in indicating the factors to be taken into account in considering whether disclosure of documents referred to is reasonable and proportionate, includes sub paragraph (3) in the following terms - "The likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence." That reference is, itself, consistent with what I have already said about the underlying assumption of paragraph 21.

29. Although all the other factors, or the majority of the other factors, may be in Accor's favour in this respect, that particular factor seems to me to be very much in Lloyds' favour. The documents referred to are all concerned with funding and will have no probative value in supporting or undermining a party's claim or defence. Accordingly, I would need some persuading that it was reasonable and proportionate to order disclosure of documents which have absolutely nothing to do with the substance of this action.

30. In answer to that, Mr Blackett says that the statements given on the application for an extension of time do not fall away; they are still statements which stand; and the accuracy of what Mr Jacobs said in his statements, and which might be supported by or undermined by disclosure of further documents, might be relevant to the accuracy of, or any challenge to, any evidence that he might give in the future. In my view that is all utterly speculative. There is no particular reason why Mr Jacobs ought to give any further evidence and, as Mr Bowling has said, if he does then the onus will be on Accor to take up the point that any evidence that he gives should be supported by all the documents that he refers to and, if it is not, that the court may be disinclined to place much weight on what he says. I would add, as I said in my judgment, that Mr Jacobs, as administrator, is himself an officer of the court. He has obligations particularly to the Scottish court which, in effect, appointed him and I would take some persuading that I ought to proceed on the assumption that his statement might have been inaccurate and might have been inconsistent with documents that might have been referred to, so that the obtaining of those documents now, and even though they were not sought on the application, is a reasonable approach to take. But in any event it seems to me that the answer to this application lies in the fact that the documents have no probative value in this litigation and I, therefore, do not make the order that is sought by Accor in this respect.

(Following further submissions)

31. The first application that I have in relation to costs is for Lloyds to pay Accor's costs of producing a document called the Particulars of Non Compliance. Having had some difficulty initially in understanding the chronology of events, it is now clear to me that the position is as follows. The Claim Form was served with Particulars of Claim in January 2022 and Lloyds' pleaded case was that its design for the hotel had been approved by Accor. The Defence said that the design was not approved. The Reply pleaded a case that the design was compliant with the Accor "brand standards" and ought to have been approved, even if, in fact, it was not approved.

32. I accept from Mr Bowling that what happened thereafter, I assume in correspondence, was that Accor adopted the position that that case in the Reply ought to be incorporated into an Amended Particulars of Claim. That was done and Her Honour Judge Kelly gave permission for those Amended Particulars of Claim on 14 October 2022. Her order provided that the claimant had permission to file and serve Amended Particulars of Claim by 10 October 2022. She gave permission for and a date for the filing and service of a consequential Amended Defence and Counterclaim and for a consequential Amended Reply and Defence to Counterclaim. She ordered that the claimant would pay the costs of and occasioned by the amendments referred to in the preceding paragraphs.

33. Accor's application is made on the basis that the costs of preparing Particulars of Non Compliance are costs of and occasioned by the amendments so referred to in that Order. I will return to that point in a moment.

34. Accor's Amended Defence asserted that the Lloyds' design did not comply with the brand standards (and therefore ought not in any event to have been approved).

35. Lloyds asked for Further Information, by a Part 18 Request, of the respects in which the design did not comply. That was resisted by Accor on the basis that they needed to say no more than they had currently pleaded.

36. The matter came before Mr Justice Waksman in January 2023 and Mr Blackett has explained to me that the dispute between the parties at that point was, in a sense, who should go first, that is whether Lloyds should say how their design did comply with the brand standards to which Accor would respond or the other way round, such that Accor should say first how the design did not comply with the brand standards to which Lloyds might respond. The order of Mr Justice Waksman was, in effect, that Accor should go first by serving the Particulars of Non Compliance, which they did. He made no further order in respect of the costs of serving that document which has been referred to as the PNC.

37. The arguments line up essentially as follows. As I have indicated, Mr Blackett says that the origin of the PNC was, therefore, in the amendments that were made to the Particulars of Claim. Thus, he submits, the costs of the PNC are costs of and occasioned by the amendments. Mr Bowling says that, even if that was in one sense right, that was overtaken by the order of Mr Justice Waksman in which he ordered the PNC to be provided and made no order as to costs. In any event, Mr Bowling submits that the costs of and occasioned by the amendments could not conceivably be the whole of the costs of drafting that document which particularises the Amended Defence. That would have the effect of making the entirety of the pleading at the claimants' cost. What "costs of and occasioned by the amendments" means is not that the whole of the costs are recoverable by the defendants from the claimants but rather that what I referred to as the extra over cost, and he referred to as the friction cost, is recoverable, that is the costs that would not have been incurred if the case had been pleaded on that basis in the first place. Those costs are likely to involve revisiting the document, reconsidering the statements of case, and so forth.

38. Both of those submissions seem to me to be right. It seems to me the order of Mr Justice Waksman necessarily means that the costs of the PNC were dealt with by him on that occasion and do not fall within the compass of costs of and occasioned by the amendments even if that was, in the sense of "but for" causation, the origin of that document being produced. If I were wrong about that I would accept Mr Bowling's submission in relation to the meaning of "costs of and occasioned by" the amendments although not necessarily his terminology. Yet further, and in any event, I have, as I said in the course of argument, never seen an application made for costs of an amendment to be paid in the course of the proceedings rather than at the end of the proceedings, when they are subject to detailed assessment, and certainly not where no such order for immediate payment was made on the application to amend. That procedural point is met by the application being one for an interim payment but such an application, it seems to me, is equally unusual. So for those reasons I do not make any order for any payment of costs in relation to the PNC.

39. There is an argument between the parties as to whether costs of that document have or will be wasted. I do not propose to recite those arguments or make any decisions in that respect because that is not the basis of the application that is before me. However, I will bear in mind that additional costs in the pleading of amended statements of case have been incurred by Accor when I come to deal with the application or applications in respect of security.

This transcript has been approved by the Judge