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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (Ch D)
[2020] EWHC 2440 (Ch)

No. HC-2014-002047

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 11 August 2020

Before:

MR EDWIN JOHNSON QC
(Sitting as a Deputy High Court Judge)

B E T W E E N :

(1) TIMES TRAVEL UK LTD
(2) NOTTINGHAM TRAVEL LTD

Claimants

- and -

PAKISTAN INTERNATIONAL AIRLINES CORPORATION

Defendant

MS. H. MURPHY (instructed by Invictus Law LLP) appeared on behalf of the Claimants.

MR T. BELL (instructed by City Solicitors Ltd trading as Farani Taylor Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

THE DEPUTY JUDGE:

Introduction

- 1 This is the hearing of an application made by the claimants for an order imposing financial conditions upon the ability of the defendant to make its own application under CPR Rule 40.12, which I shall refer to as “the slip rule”. The defendant’s application under the slip rule, which was made by application notice dated 7 May 2020, is listed to be heard before me on 14 September 2020. I will refer to the defendant’s application under the slip rule as “the defendant’s application”. Both the claimants’ application and the defendant’s application arise further to the trial of an account and inquiry, directed by Warren J by an order dated 14 June 2017. The trial was heard before me on 10 and 11 December of last year. I handed down my judgment on the trial of the account and inquiry on 7 February 2020, and I made an order consequential upon my judgment on 21 February 2020.
- 2 The defendant is the national airline carrier of Pakistan. The claimants are travel agents specialising in travel between the United Kingdom and Pakistan. Both of the claimants were parties to agreements with the defendant pursuant to which they sold tickets to members of the public on the defendant’s flights to and from Pakistan. In 2014 the claimants commenced proceedings against the defendant making claims in respect of unpaid commission or remuneration from the defendant on the sale of airline tickets. Those proceedings followed earlier proceedings brought by other travel agents against the defendant in which similar complaints of unpaid commission or remuneration were made against the defendant. The claims of the claimants, as I have said, came to trial before Warren J in 2017. The judge found in favour of the claimants and awarded judgment in favour of both claimants for an account and inquiry as to the amount due to each of the claimants. I will refer to the account and inquiry directed by Warren J as “the account”.
- 3 In my judgment on the trial of the account I found that the defendant was liable to each of the claimants for substantial sums by way of unpaid commission or remuneration, together with considerable amounts of interest thereon. By the terms of my order of 21 February 2020 these sums were required to be paid by 6 March 2020. The sum ordered to be paid to the first claimant was £2,770,533.37. The sum ordered to be paid to the second claimant was £2,400,938.95. As matters stand, the defendant has not paid any of these judgment debts. The claimants have by a third party debt order made on 11 May 2020 received payments which I understand to be, respectively, £738,795.46. The claimants have also, much more recently on 7 August 2020, secured a third party debt order pursuant to which the respective sums of £438,502.01 and £438,502 fall to be paid to the claimants. I understand that these sums have not yet actually been paid to the claimants in compliance with that order.

The claimants’ application

- 4 The claimants’ application, which I will refer to as “the claimants’ application”, has been made by an application notice dated 3 July 2020. The claimants’ application seeks an order that unless the defendant pay the uncontested judgment debt to the claimants and the contested judgment debt into court, in each case by 25 August 2020, the defendant’s application should be dismissed or stayed. I was originally requested to deal with the claimants’ application as a paper application. I decided that this was not an appropriate course. The consequence is this hearing, which is being held as a remote hearing. On this hearing the representation of the parties was the same as at the trial of the account. Ms

Heather Murphy appeared for the claimants and Mr Thomas Bell for the defendant. Both counsel provided me with very helpful skeleton arguments; that is to say, written arguments, in addition to their oral arguments.

- 5 The evidence in support of the claimants' application is set out in the application notice itself. In response, there is a witness statement of Mr Khalilullah Shaikh, the Chief Financial Officer of the defendant, which is dated 29 July 2020. In this context I should also mention two emails which were sent to me on 29 July 2020 by the defendant's solicitors. In one of these emails, the more substantial of the emails, there were set out proposals for payment by instalment of the uncontested judgment debt to the claimants and for payment by instalments of the contested judgment debt into court and it was proposed that I should make an order to this effect, effectively providing for payment of the various parts of the judgment debt by instalment. There was no formal application to that effect and this was not a matter which was pursued by Mr Bell for the defendant in this hearing.

The defendant's application

- 6 In order to understand the reference to contested and uncontested judgment debts in the claimants' application, it is necessary to explain briefly what is sought on the defendant's application. As I have said, the defendant's application was made on 7 May 2020. The defendant's case is that there is a substantial mistake in the calculation of the sums which I found to be due to the claimants on the trial of the account. The defendant says that the sums due by way of what were called net sale remuneration (which I will define as NSR) and the agent productivity scheme (which I will define as APS) have been calculated on the basis of gross ticket prices, but should have been calculated on the basis of ticket prices net of tax. If the defendant is correct in this contention it makes a substantial difference to the sums which I found to be due to the claimants by way of unpaid NSR and APS. The judgment debt owed to each claimant is substantially reduced, albeit there remains a substantial judgment debt still due to each claimant. The defendant's case is that this mistake, if mistake it was, can be corrected under the slip rule. Subject to the claimants' application before me today, the defendant's case, namely that a mistake has been made which can be corrected under the slip rule, will be heard by me on 14 September 2020. The defendant has also made an application to the Court of Appeal, out of time, on 12 May 2020 for permission to appeal against my order of 21 February 2020, also on the basis of what is said to have been a mistake in the calculation of the figures for unpaid NSR and APS and on the basis that this is a mistake which can and should be corrected. That application for permission to appeal, which I understand has not yet been determined, has been made without prejudice to the defendant's contention that the alleged mistake can be corrected under the slip rule.

The figures

- 7 In her skeleton argument Ms Murphy sets out the contested and uncontested figures which the claimants say are due by way of judgment debt. These figures take into account the sums received pursuant to the third party debt order of 11 May 2020 and assume that the sums due pursuant to the third party debt order of 7 August 2020 will be paid. On this basis the relevant figures, including interest and calculated to the date of this hearing, are as follows. In the case of the first claimant, the judgment debt which is outstanding is £1,691,668.05. The amount of the judgment debt which is uncontested is £300,973.08. The amount of the judgment debt which is contested is £1,390,694.97. In the case of the second claimant, the figures are as follows. The judgment debt outstanding is £1,306,845.61. The amount of the judgment debt which is uncontested is £434,438.53. The amount of the judgment debt which is contested is £872,407.08. These are not, at least at the moment,

agreed figures. Mr Bell also provided figures in his skeleton argument for the uncontested and contested amounts of the judgment debt, again calculated to today and in relation to those figures there was a substantial difference between counsel's figures in the case of the contested judgment debts. In relation to the uncontested judgment debts the figures were almost, but not quite, identical.

The arguments

- 8 Starting with Ms Murphy who, as I have said, appeared for the claimants, Ms Murphy submitted that there was no need for me to engage with the merits of the defendant's application. Ms Murphy, sensibly, did not seek to persuade me today that the defendant's application is hopeless. That is a submission which she will make at the hearing on 14 September of this year, subject, of course, to the outcome and consequences of this application, but, as I have said, Ms Murphy sensibly accepted that it was not going to be possible to persuade me today that the defendant's application was hopeless, although she made it very clear that it is opposed. In those circumstances, it was submitted that I should not engage with the merits of that application. Ms Murphy submitted that the central point was the question of whether the making of the conditions order which she seeks would actually have the effect of stifling the defendant's application and, in this context, she made a number of points on the witness statement of Mr Shaikh who, as I have said, is the Chief Financial Officer of Pakistan International Airlines Corporation. Ms Murphy took me through the witness statement of Mr Shaikh and her overall point was that the witness statement was silent on a number of matters on which one might have expected to hear evidence. She made the point that the witness statement was silent on the assets which the defendant actually has. It does not engage with the question of the defendant's ability to raise credit, it is silent on the question of what liabilities there are owed to clients and of what kind, and it is silent on the question of whether it would or would not actually be possible for the defendant to comply with a conditions order of the type sought by Ms Murphy. Ms Murphy submitted that it was not obvious that there was actually any difficulty in the defendant meeting the terms of the conditions order and she pointed out that the highest that matters were put by Mr Shaikh, in paragraph 10 of his witness statement, was to say that it is going to be "really tough and difficult to make such a commitment. However, PIACL shall discharge this burden by adopting every possible means". I should make it clear that, in referring to such a commitment, what Mr Shaikh was referring to was the proposal which came, as I have said, from the defendant's solicitors; namely that there should be an instalment plan put in place for dealing with the contested and uncontested parts of the judgment debt.
- 9 The overall submission of Ms Murphy was that the burden of proving that the defendant's application would be stifled by the conditions order rested firmly on the defendant and, so she submitted, that burden had not been discharged. In those circumstances Ms Murphy went on to submit that the defendant is effectively, this was her expression, a delinquent judgment debtor. She pointed me to the history of non-compliance by the defendant with court orders. She made the point that the judgment debts represent sums which have been outstanding for a very long time and she also made the point that the claimants have had to resort to third party debt orders to achieve part satisfaction of the judgment debts. In her phrase, this is a case of will not pay rather than cannot pay and, in those circumstances, Ms Murphy submits that this is a paradigm case for imposing conditions and, in terms of the sanction should the conditions not be met, Ms Murphy made it clear that her submission was that the defendant's application should be dismissed rather than be subject to a stay. Her fallback position was that if there was to be a stay rather than a dismissal, if the conditions order was not complied with, it should have what was referred to as a sunset clause in it

whereby, after a certain period of time, there would be an automatic dismissal of the defendant's application.

- 10 In response to these submissions Mr Bell made three principal submissions. The first submission was that there are no circumstances in which an application under the slip rule should be made subject to payment of a disputed debt or, alternatively, one requires exceptional circumstances before an application under the slip rule should be made subject to payment of the disputed debt. In support of that first submission Mr Bell relied on the *Riva Bella* case, to which I shall come. Mr Bell's second submission was that the order would have the effect of stifling the application, it would impose conditions which the defendant would not be able to meet and, as a result, the defendant would be deprived of the ability to pursue the defendant's application. Third, Mr Bell's fallback position was that if I was minded to make a conditions order of any kind then I should only make a conditions order in relation to the uncontested part of the judgment debt.
- 11 In considering the rival arguments I find it convenient to take the same course as that taken by Mr Bell and to go through his three principal submissions. I start with the submission that there are no circumstances in which an application under the slip rule should be made subject to financial conditions or, in the alternative, that one at least requires exceptional circumstances, "wholly exceptional circumstances" was his expression, before an order of that kind should be made. I do not accept that submission. I do not accept that there are no circumstances in which an application under the slip rule should be made subject to conditions, nor do I think that such an order can only be made in wholly exceptional circumstances. I do not think that that is actually what the *Riva Bella* case decided. Coming specifically to that case, the full title of which is *Riva Bella v Tamsen Yachts* [2011] EWHC 2338 (Comm), the case was a decision of Eder J. In the case it was contended by the defendant, as it happens, that the claimant in that case had failed to pay sums which were said to be due under an order, and it was said for that reason that an application under the slip rule to correct the relevant part of the order should not be entertained. The particular argument which was advanced by the defendant in this context was dealt with by Eder J in paragraph 19 of the judgment. The argument was that the claimant was in contempt of the relevant order on the basis that the claimant had not paid the sums which it had been ordered to pay and it was argued that this contempt meant that the claimant should be shut out from making the application under the slip rule that it wished to make. That was a submission which was not accepted by the judge and I think it is only necessary for present purposes to read the final sentence of paragraph 19 of the judgment, which is as follows:

"If this is indeed a case of an accidental slip or omission in a judgment or order within the meaning of CPR 40.12 which the court should correct then it seems to me that it would be wrong in principle or contrary to the interests of justice for the court to refuse to make the necessary correction".

It seems to me that this paragraph is concerned with a situation where the respondent to an application under the slip rule argues that the applicant should not be heard, because the applicant is in contempt of the relevant order on the basis that the claimant has not paid the sum which is said to be due, in circumstances where the sum which is said to be due is being challenged by the application under the slip rule. It seems to me that Eder J decided that, in such a case, at least as a general rule, the court should hear the application and decide whether the judgment was capable of correction under the slip rule, rather than treating the applicant as being in contempt of court and unable to pursue the relevant application. It

seems to me that the equivalent situation in the present case would be one where Ms Murphy argued at the hearing of the defendant's application on 14 September that the defendant should not be heard, because it had not paid the amount of the contested judgment debt. In my judgment, it seems to me that such a submission would be likely to fail on the basis of what Eder J said in the *Riva Bella* case, but it seems to me that we are in a different situation here where the question does have to be addressed of whether the conditions order will stifle the application. If the decision on that question is that the conditions order will not stifle the application, then it does not seem to me that one is in a situation where a financial conditions order cannot be made or can only be made in wholly exceptional circumstances. It seems to me, on that hypothesis, that the matter becomes a decision for me to make on the basis of my general case management powers. So I reject the first submission of Mr Bell.

- 12 That brings me on to the second submission of Mr Bell which concerns the question of whether the making of a conditions order will stifle the application.
- 13 It seems to me correct, indeed I did not understand this to be disputed, that the burden is upon the defendant to establish that the application would be stifled if the conditions order sought or a conditions order would have that effect. In that context it becomes necessary to consider the witness statement of Mr Shaikh. In the context of the witness statement of Mr Shaikh I accept the points that are made by Ms Murphy on that witness statement. It seems to me that the witness statement does not establish, nor does it seem to me to come anywhere near establishing, that the defendant's application would be stifled by the making of a conditions order. What the witness statement does do is to state that, in terms of liabilities and assets, the liabilities of the defendant substantially exceed the assets of the defendant. The witness statement also states, and I, of course, accept this, that these are exceptionally difficult times for the airline industry, indeed for the whole of the travel industry, and that that has itself had a very adverse financial effect on the defendant's business. I also accept that the defendant has been subject to restrictions on where it can and cannot fly to and I also accept that further difficulties have been caused to the defendant by the tragic air crash of one of the defendant's aircraft which occurred on 22 May 2020 near Karachi.
- 14 So, I accept that these are very difficult times for the defendant. I accept that the defendant's overall financial position is, according to this witness statement, not a good one, indeed it appears to be a very poor one, but what the witness statement does not do is establish that the defendant simply does not have the cash available to meet the terms of a conditions order, nor does it establish that the defendant does not have the means of raising from some other source the means to satisfy a conditions order. It seems to me that the relevant evidence in this respect would need to be a good deal more specific than the evidence of Mr Shaikh, if such evidence was to be capable of establishing that the defendant's application would be stifled by a conditions order.
- 15 This is not a question of my doubting what has been said by Mr Shaikh in his witness statement, rather it seems to me that Mr Shaikh's evidence falls well short of establishing that the defendant's application will be stifled if the conditions order will be made.
- 16 Ultimately, I agree with Ms Murphy that the burden of satisfying me that the defendant's application would be so stifled has not been discharged by the defendant. In those circumstances, I also reject Mr Bell's second submission.
- 17 In those circumstances it seems to me that the matter becomes one for the exercise of my general case management powers under CPR Rule 3.1. In the exercise of those general case

management powers there are two factors which it seems to me need to be highlighted and seem to me to be of particular importance.

- 18 The first is that a substantial sum of money turns on the defendant's application. If the defendant is right in the application, then the amount of the judgment debt which I ordered to be paid by my order of 21 February 2020 will be substantially reduced. In those circumstances, I am somewhat wary of making an order requiring all of that money, by which I mean the entirety of the contested and uncontested judgment debts, to have to be paid into court. In this particular context, by which I mean the context of the exercise of my general case management powers, I do think that there is some weight to be given to Mr Bell's first point that applications under the slip rule are qualitatively different to other such applications. I think that that is a point which can be given some weight in this context and the reason I say that is because the submission of the defendant, as I understand it on the hearing of the defendant's application, and subject to the outcome and consequences of this application, will be that the slip rule is engaged in the present case, because the order which I made failed to give effect to the intention which I had in giving my judgment.
- 19 That is a matter which is due to be argued and it is not before me today, but it does seem to me to be of some importance that, if the defendant's application is well-founded, one does have a situation here where an order for the payment of a substantial sum of money does not actually reflect the intention which the court had when it handed down its judgment and made that order. In case management terms, it seems to me that that is a factor should weigh with me.
- 20 The second factor is this. While I have reached the firm conclusion that the defendant has failed to discharge the burden of satisfying me that the defendant's application would be stifled if a conditions order is made, I do accept that these are difficult financial times for the airline industry and I do accept that the defendant has been no exception to this.
- 21 Indeed, I accept that the current circumstances appear to have had a very serious effect on the defendant, along with other difficulties which the defendant has experienced. That is, in my judgment, something that I can take into account in terms of whether I should make a conditions order and, if so, what sort of conditions order that I should make. In saying that, I should make it absolutely clear that I in no way downgrade or ignore the important point made by Ms Murphy which is that the claimants are also in the travel business and I have no doubt that the current circumstances with the pandemic have created serious difficulties on the claimants' side which also fall to be taken into account.
- 22 As I say, I do not denigrate or downgrade those difficulties at all and I entirely accept that they are being experienced, but it does not seem to me, keeping the situations of both parties in mind, that the claimants' situation prevents me from taking into account the particular financial difficulties which the defendant is facing at the present time.
- 23 In those circumstances, taking into account those two particular factors and taking all the circumstances of the case as they currently stand into account, I have come to the conclusion that the fair and just order to make in the present case is a conditions order in relation to the uncontested judgment debts only; that is to say, the fallback position adopted by Mr Bell by way of his third submission.
- 24 That being so, the next question which arises is what the sanction should be if there is non-compliance with the conditions I have in mind. It seems to me the answer to that is that there should be a stay, not a dismissal. It does not seem right to me that the defendant's application should automatically be dismissed if there is a failure to comply with the

conditions. It seems to me rather that the defendant's application should be subject to a stay and, if either party subsequently wants to apply to lift that stay, then it can do so.

- 25 It is worth pointing out that it is open, so far as I am aware, to the claimants at any time to seek to enforce the judgment debts in the order which I made and, indeed, the claimants have done that by means of the third party debt orders. There is, as I understand the position, no stay of any kind currently in existence in relation to my order, so the claimants have available to them all of the enforcement options which exist at the present time. It is not as if the stay on the defendant's application operates as a stay on the substantive judgment.
- 26 In relation to Ms Murphy's proposal of a sunset clause on the stay, it seems to me that it is not right that there should be such a sunset clause, essentially for the same reason. There should be a stay, rather than an automatic dismissal kicking in at some later stage. I do take Ms Murphy's point that that might create difficulties in the future, if there was to be a situation where the judgment was entirely satisfied, but then there was an application to lift the stay, but it seems to me that that would be an application which would fall to be considered against the background of all the relevant circumstances by the court hearing that application.
- 27 Ms Murphy also submitted to me that there could be procedural difficulties or uncertainties if there was a stay rather than a dismissal, but it does not seem to me that that is so. It seems to me that if the conditions order is not complied with the defendant's application would be subject to a stay and, so far as the Court of Appeal is concerned, it remains to be seen what happens there, as I understand the position. There is no stay which has been ordered by the Court of Appeal. The defendant's application to the Court of Appeal for permission to appeal has been made out of time. Whether the Court of Appeal will be prepared to grant permission to appeal out of time remains to be seen. If such permission to appeal is granted out of time, it remains to be seen what will happen to the appeal. That in turn will intermesh with the question of what happens to the defendant's application, but so far as I can see there is no procedural confusion or difficulty created by the sanction being a stay.
- 28 The next question is what the timing of the sanction should be, because the date for the hearing of the defendant's application, 14 September, 2020, is now fast approaching. Mr Bell submitted to me that the relevant date should be 11 September 2020. That would in fact be the Friday immediately before the Monday on which the defendant's application would be heard.
- 29 I agree with Ms Murphy that that is an unworkable date, and I also accept that that would work an injustice to the claimants because it would require the claimants to prepare for the hearing, filing any evidence they wish to file and briefing Ms Murphy and Ms Murphy making her preparations for the hearing in circumstances where the claimants would not know whether the conditions order had taken effect. So it seems to me that 11 September is not an acceptable date.
- 30 The proposal, as I have said, of the claimants in the application is that the relevant date should be 25 August 2020. In choosing the date I should make it clear that I am not operating on the basis that there is any date which the defendant is unable to make. As I have said, and this goes back to my reasoning in relation to the question of whether the application would be stifled by a conditions order, I have not seen any evidence to satisfy me that, if the conditions order operates by reference to a particular date, that is a date which the defendant will not be able to meet. In fact, if one looks at the instalment plan which was proposed by the defendant's solicitors, it was proposed that there should be monthly payments on the 5th of each month, starting on 5 August. If one totals the figures that would

have been paid on 5 August and 5 September, they do in fact more or less equal the amount of the uncontested judgment debts.

- 31 However, I cannot stress too highly that I do not take from that that it would be impossible for the defendant to meet an earlier date. It seems to me that it is important to preserve as much distance as possible between the date by which the conditions order has to be complied with and the date of the hearing of the defendant's application so as to minimise, if not eliminate entirely, the risk of wasted costs. In those circumstances, I am prepared to grant the defendant a little more time than 25 August, but only a little more time. The date which I propose as the date by which the conditions order must be complied with will be 1 September 2020; that is to say, the Tuesday which falls one week after 25 August 2020. So effectively I am giving the defendant an additional seven days but no more than that.
- 32 There is one other matter which I should deal with in this context and that is that Mr Bell, at the conclusion of his submissions, also stated that his client wanted a stay on the enforcement of the contested parts of the judgment debt, if I was minded, as I have been, to make a conditions order only in relation to the uncontested judgment debts. Mr Bell's concern was that in the meantime there might be attempts at enforcement of the contested parts of the judgment debt. I refuse to order any such stay. It seems to me that if there is to be any stay on any part of the judgment debt, that must be a matter for a formal application which will have to be heard by the court.
- 33 In the absence of such application, it does not seem to me right to change the *status quo*. The existing situation is the same situation, as I understand the position, as has obtained since 21 February 2020, namely that it has been and remains open to the claimants to take whatever enforcement action is legally available to them and they see fit in relation to unpaid parts of the judgment debt. So, I am not prepared to grant any stay of the kind sought by Mr Bell.
- 34 So the outcome of this application is that the application is allowed in part. There will be a conditions order in the terms of the draft order which is attached to Ms Murphy's skeleton argument, but only in relation to the uncontested judgment debts, not in relation to the contested judgment debts. The compliance date will be 6 p.m. on 1 September 2020 and, if that deadline is not met, the sanction will be a stay of the defendant's application. Finally, I should mention that the parties will need to agree figures between themselves for the uncontested judgment debts so as to remove the minor discrepancies which currently appear in the rival figures for the uncontested judgment debts in counsel's respective skeleton arguments.
- 35 That concludes my judgment.
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CERTIFICATE

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This transcript has been approved by the Judge.