



Neutral Citation Number: [2020] EWHC 1960 (Comm)

Case Nos: CL-2020-000287

And CL-2020-000288

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 25th June 2020

Before:

MRS. JUSTICE COCKERILL
Remotely via Skype for Business

Between:

TRAVELPORT LIMITED AND ORS	<u>Claimants</u>
(the “eNett Claimants”)	
- and -	
WEX INC.	<u>Defendant</u>

And Between:

MR. ADAM RHYS OLDING AND ORS	<u>Claimant</u>
(the “Optal Claimants”)	
- and -	
WEX INC.	<u>Defendant</u>

MR. LAURENCE RABINOWITZ QC, MR. SA’AD HOSSAIN QC, MR. DAVID

MUMFORD QC, MR. SEBASTIAN ISAAC and MR. TIM GOLDFARB (instructed by
Macfarlanes LLP) for the Claimants

MS. SONIA TOLANEY QC, MR. CONALL PATTON QC and MR. ANDREW LODDER
(instructed by Freshfields Bruckhaus Deringer LLP) for the Defendant

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS. JUSTICE COCKERILL:

1. I have obviously thought about this very carefully. I am going to deal first with the overall question of whether there should be expedition and preliminary issues, because despite the fact that there is enthusiasm on one side and at least consensus on the other side as to the ordering of preliminary issues on an expedited basis, it is obviously a matter for the court and the decision is a discretionary one.
2. I have looked at the legal context taken from *W.L Gore & Associates GmbH v Geox SpA* [2008] EWCA Civ 622 and the tests set out there, which have been applied in subsequent cases, notably in the *Apache Beryl* [2017] EWHC 2258 (Comm), that being the authority to which the Commercial Court Guide specifically makes reference.
3. I have to consider the question firstly of good reason, so: is there objectively urgency? Then whether expedition would interfere with the good administration of justice? That is, can the case fairly be tried if expedition is ordered or will ordering expedition unfairly prejudice other cases; and whether expedition would cause prejudice to the other party. Then there is the question of whether there are any other special factors; which encompasses such things as the procedural history, including whether there has been delay.
4. This is not a special factors case, it is really all about the interplay of good reason/urgency and fairly trying the case/prejudice with what one might say is a small side issue as to the effect on other court users.
5. So far as good reason is concerned, I am here where I was before. I am persuaded that this is a case where one may say that there is good reason/urgency to an extent, while the case is not necessarily at the top of the rankings in terms of urgency and good reason. So it is not, for example, a time-critical test case affecting an entire market.
6. It is, of course, a very big claim and, therefore, of enormous importance to those concerned with it. It does have at least some resonances for other cases, even if there is no direct read over. Within the case itself, that is where the urgency is really put, and that is because of the drop-dead date and the combination of damages being, as the parties have agreed, no adequate remedy, the potential for the financing to fall away and the possibility of damages being limited to a relatively low sum. So that is bearing in mind the various factors which Mr. Rabinowitz alluded to in his submissions before me previously.
7. There is the Debt Commitment Letter expiry, which he notes is something which was specifically contracted for and the fact that specific performance is given as a remedy. There is the submission that prejudice arises notwithstanding the evidence of Mr. Rabanal, that WEX may be able to secure or may have in its pocket sufficient funds for financing. However good that evidence is, there is a degree of prejudice simply because certainty is changed for uncertainty.
8. There is the issue of the fact that damages may not be able to compensate, aside from the fact of the parties having agreed for a specific performance, because of the limitation of liability to around 3% of the consideration, the factors about difficulty of assessment of damages. And here, even though the evidence on WEX's ability to

complete the transaction has been supplemented by more recent evidence, those other factors remain in play and even with the more recent evidence, there still remains that fundamental distinction between the security for which the sellers bargained and the less secure assurances which they would be left with. So, it is like the difference between a guarantee and an informal assurance. Again, it is the difference between certainty and uncertainty.

9. For all that there is no obligation to complete with the Debt Commitment Letter, my own impression, with the very quick look that we had at it at the last hearing, was that section 7.15 probably suggested a need for similar replacement if there is one within the period before expiry. So a replacement with what Mr. Rabinowitz called something “approximate in all material respects” to the Debt Commitment Letter.
10. However, at the same time, it cannot be said that it was entirely outside the contemplation of the parties that the closing might happen after the date of the validity of the financing letter, so the Claimants might, even in any event, lose at least that protection; for example if a material adverse effect was declared at closing and then it had to be determined whether that was a good call with the contract still being on foot and that determination taking place the far side of a drop dead date. There are those factors.
11. There is also one factor which was prayed in aid, which was whether to spend time and money on closing, but the timeline we are looking at makes that an irrelevancy. More significantly the other fact which Mr. Rabinowitz pointed to today is the fact that the covenants include something whereby there is a need to seek consent for significant business decisions and so long as there is no closing, that means seeking consent from somebody who is an active competitor, a continuing form of prejudice, to which I think he referred to as hamstringing the business. Aside from the need to seek consent, there is co-operation, which is more of the same.
12. As I have said, all of that adds up to me to ticking at least to an extent the box for urgency and good reason without making it the most compelling case imaginable on that front.
13. Where the case fell down for me last time in relation to the application to expedite the trial was on various issues as to how the trial could possibly be run, but also as to how it could fairly be tried against a background where the issues were still amorphous and what was being sought was that full trial.
14. Developments since then reassure me that that decision was one of my better decisions. As matters have transpired, it plainly would not have been possible to try the entirety of the case fairly in the timeline suggested or in the window sought. More positively, the repleading does seem to have focused minds so that we now have in place a meaningful, (if not an agreed), list of issues by which the ambit of the disputes between the parties can be judged. While the parties are not formally agreed as to the ordering of preliminary issue to an expedited timetable there is at least broad consensus that there are such issues whose speedy determination could assist the parties and within the time period that we are looking at.
15. As for other court users, while some timetables would be unfair to them, there is at least possibly more than one potential timetable which could accommodate this case without causing prejudice to other court users. There is an issue about whether the

timetable would permit of an appeal and I will come back to that because that is an issue which has been much debated.

16. Looking at this purely as a question of expedition, I would subject to defining the issue as being in favour of expedition. However it would be wrong for me to do so without at least considering the authorities on preliminary issues also, looking at Lord Neuberger's judgment in *Steele v Steele* [2001] CP Rep. 106 at pages 7-13. He listed the questions the court ought to ask before ordering a preliminary issue. Running through those, will it dispose of the case or at least one aspect of the case? To that, we, I think, can say yes in the sense that it could potentially, on one analysis, dispose of the case. It will at least dispose of at least part of the key issue in the case. Will it cut down cost and time involved in pre-trial preparation or in connection with the trial itself? It is always hard to say, but depending on outcomes, there is at least a real possibility that it will do so significantly and, in any event, there is a real possibility that it will do so even if issues are not finally disposed of.
17. It is not a preliminary question of law, so the questions in relation to that do not arise. The question of, if it is not based on agreed facts, to what extent does that impinge on the value of preliminary issue? I am persuaded that while it is fairly unusual to order a full preliminary issue trial, including expert evidence, it is not unheard of. Both parties see real value in it and it strikes me also as being likely to be of considerable value in managing this case sensibly and bringing it to as early a conclusion as possible.
18. Will it unreasonably fetter the parties or the court in achieving a just result, for example by cutting down flexibility at trial? No, it is essentially either disposing of an issue or clearing the ground and focusing the parties on a much more narrowed portfolio of issues.
19. Will it increase the risk of delaying the trial or increase costs, for example because of appeals on the preliminary issues? That is a risk which is pretty much inherent in preliminary issues.
20. Will the preliminary issues be irrelevant, depending on how other issues are resolved at trial? It is hard to see how that could be the case, because this is an issue which has to be determined. It is right at the centre of the dispute.
21. Is there a risk that determination of preliminary issues could lead to an application to amend the pleadings to avoid the consequences of a determination? That is possible but seems unlikely.
22. So when I come to the overall question as to whether it is just to order a preliminary issue, weighing all the factors, it seems to me it is. It is an unusual preliminary issue trial but it seems to be both an appropriate and sensible way of proactively managing this case, which has a degree of urgency about it and can only be dealt with on an urgent basis this way. It is less likely to have the usual sorts of complications than most non-legal preliminary issues in that it is unlikely that if this proceeds to a full trial, there is going to be a substantial overlap between issues which are left to be decided at phase 2 with the issues that have been decided at phase 1.
23. With that in mind, I am prepared to order preliminary issues on an expedited basis. As to the length of the potential trial, I have discussed with counsel during the course of submissions the competing lengths which are offered. I regard the five-day

estimate as too short and the eight-day estimate as too long, eight days with some non-sitting days. I have indicated that I would be minded to put this down for one to two days' judicial pre-reading, depending on who the judge is, five days definite in court for the evidence, giving a weekend and then closings over one/two days the next week.

24. As regards timetable to trial, this is a factor of where one gets for the actual timing of the trial. Here, overall, I do have concerns against the background as to the realistic nature of the Claimants' draft timetable. I cannot quite put out of my mind the Claimants' position as regards past submissions on realistic timetables, the fact that we are here as a result of initially an absence of clear pleading and absence of clear formulation of issues at an earlier stage when an expedited trial was sought; or that there have been issues, frankly, in the production of granular case management-type documents since. For example, there has been a degree of flip-flopping on the draft order and the timetable. It is not helpful that a draft timetable was produced so late, because in terms of trying to get to grips with what this case needs, a draft trial timetable is a key document. That does not inspire confidence and I do approach this with a sense that there has been something of a lack of real practical drilling down into how this trial of these issues, which the Claimants want, is actually to work.
25. I do also consider that when I am looking at this, a degree of caution has to be introduced for the August factor. With the best will in the world -- and I know that both teams have worked incredibly hard and are committed to working incredibly hard going forward -- I would not feel entirely happy ordering a timetable which did not have some degree of slack to accommodate the fact that things just do not work as well over August and we do not know yet what the commitments of the experts are going to be. Experts can sometimes be a bit difficult over August. What one simply cannot have is ordering an expedited trial, prioritising this case, and then having it derailed by a timetable which falls apart.
26. When I came to auditing all of this myself -- and still now in the light of having listened very carefully to the submissions on both sides -- my sense is that it might be possible, potentially, to bring this to starting a trial maybe a week or so earlier than the Defendants suggest, but I would have considerable reservations about the robustness of a timetable going to 3rd September, basically the Claimants' proposed date.
27. Looking at individual points within the trial timetable, I am not satisfied that the optimistic date of 23rd June for the DRD to be agreed is realistic. It has only been in play a short time. There are still issues being debated. On witness statements, the Defendants are seeking two weeks after disclosure. The number of witnesses they are seeking is not excessive. They are entitled to decide who can best speak to the relevant questions and it is not necessarily the case it will be one person. Proofing two or three or four witnesses is more work than proving one, so I do think a lot more time is needed for witness statements. It is not so much about documents and linking it to disclosure, but simply the time that is needed clear after disclosure is finished to do that difficult job. But, there is always, it seems to me, the possibility of needing to deal with something in the disclosure, not necessarily in the other side's disclosure, but in a party's own disclosure which will only possibly have come to light fully in time for exchange within the disclosure timetable.

28. So far as expert evidence is concerned, the Claimants are agnostic about whether it is necessary. My own impression is it is likely to be helpful and it was something that the Claimants had originally anticipated having. I certainly think that provision needs to be made for it. Whether we will need as much time ultimately as has been suggested for cross-examination of experts, we will await to see. We need to provide for experts.
29. So far as the timetable suggested for that goes, I do not think that this is a case for sequential experts' reports. It is not the normal kind of case in which one would order sequential experts. Accountancy and foreign law is the other area where we normally order sequential. One might order sequential in a case where the issues are not quite clear, but this is not that case either. Certainly, I felt that the Claimants' timetable was too long in the first phase of sequential and then way too compressed around what is the really important bit of the expert timetable, which is them reading each other's statements, the meeting and then producing the bit that the judge is actually likely to concentrate on mostly, which is the joint memorandum. So, I think that that basically deals with experts.
30. That then takes me to the whole trial date issue. I have explained already that on any analysis we need a judge who is available for more than one week and that that creates difficulties so far as this court is concerned. On no analysis, could this case start, whatever we did, I have ascertained, on the 3rd. I have explained that so far as this court is concerned, the middle weeks are not feasible. I have made inquiries about the potential for this to be heard by one of the Chancery Judges who is ticketed to the Financial List. That could conceivably be done. However, that would involve effectively finding somebody else to hear the things which are in the Chancery List or pushing things out of the Chancery List. That also coincides with my scepticism, frankly, about whether even starting on the 7th is robust. I do not think it would be prudent to timetable for the 7th in the light of the indications that I have already given.
31. We have that issue. Now, the big roadblock, so far as the Claimants are concerned, with putting it in for the 21st is that it would be impossible to appeal, and if you had the earlier date, you could appeal. So far as the earlier date you could appeal, it may well be the case that the Court of Appeal would hear it if it was urgent, but it will not hear it if it is not, even at that stage. I have good grounds to believe, if the matter so comes out that it presents true urgency, the difference between the kinds of dates we are looking at would not make the difference for the Court of Appeal. So we are not actually in a position where, if I go for the later date, it would entirely preclude the possibility of an appeal. As I say, the Court of Appeal would have to be satisfied the matter was urgent, but that possibility still remains in play.
32. In all those circumstances, I remain of the view that the best way to deal with this case is to put it in for the 21st. That brings into play the less than entirely compelling case for urgency; the procedural history; what needs to be done; my strong views as to the timetable; the logistical difficulties for wherever it would go, if it did not go in at the 21st. I am also strongly of the view that it is, in a sense, more important to get a robust timetable and an ability to manage this case flexibly and proactively in the interim, than it is to a win seven days or so on your start date.
33. I consider that if I take this case, with the familiarity which I have with it, I can make myself at this point the designated judge, I can actively case manage. I can put in a

PTR at some point that we can agree in due course. I can make myself available if necessary to deal with your fight on the disclosure of new documents. I will be, I am confident, in the best position to produce a speedy judgment. So that is what you are going to get, in terms of a judge and in terms of timetable.

34. In terms of the ambit of the trial, this is really all about issue 9, which has a knock-on effect into 13 and 14. This question about whether to order issue 9: where I come down on this, in the end, is that I am not happy to put it down as an issue for the trial. There is this potential for complication and as soon as you have it as an issue, people start thinking of it for witness statements and disclosure and so forth, and there will be an element of mission creep.
35. So we will stick with the issues as proposed by the Defendant, but what I want to be absolutely clear is that to the extent, as is plainly possible, that those issues effectively follow on from the determinations which are reached on the issues which I am ordering, they will be open to be dealt with by way of submissions. Whether those submissions take place as part of the closing submissions or whether they take place at the handing down of the judgment, when we will have such consequential arguments as there need to be, and the parties will need to talk at some point about scheduling the consequential hearing, I am agnostic about that. But we have had the debate. We have always understood the parameters within which those issues or those remedies may become live and it remains possible for them to form part of the judgment or the order in due course, depending on the determination. But I do not envisage that evidence will be directed to them, because they will only be live to the extent that they can be determined simply as a knock on from the determination of the other issues. So on certain contingencies they may arise and on others they will not.
36. I hope that is clear enough. How that is put into an order or whether you are happy just to leave it on the transcript -- given that I will now be case managing this case -- I am happy to listen to you, what you want to do about that. But that, I think, probably covers what we need to cover.

(For continuation of proceedings: please see separate transcript)

37. I am going to cut the Gordian knot by ordering that the Defendants can have 50% of their costs of the last hearing, because while there is some overlap and while we have got here in the end, the Claimants have effectively had to have two goes at this and really this should have been capable of being done by concentrating on exactly what was feasible and what were the issues and the suggestion that one could have a full trial within that immediate window was, I am afraid, not realistic.
38. We have ended up overlapping to a certain extent. I have had to re-read the transcript from last time I have had to re-read your skeletons from last time and the evidence from last time and that should not have been necessary. While there were certain benefits on overlaps it is right, I think, that the Claimant should pay 50% of the defendant's costs.

(For continuation of proceedings: please see separate transcript)
