

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (QBD)
MANCHESTER DISTRICT REGISTRY

Manchester Civil Justice Centre
1 Bridge Street West
Manchester, M60 9DJ

Date: Monday 11th January 2021

Before:

HIS HONOUR JUDGE HALLIWELL
(Sitting as a Judge of the High Court)

Between:

(1) SMART CHOICE METERING LIMITED	<u>Claimants</u>
(2) BES UTILITIES HOLDING LIMITED	
(3) AI ASSET PROVIDER LIMITED	
(4) AI HOME SERVICES LIMITED	
- and -	
(1) CHRISTOPHER FAGAN	<u>Defendants</u>
(2) LEE SHAUN DICKINSON	

MR DAVID READE QC (instructed by **Weightmans LLP**) for the **Claimants**
MR ADAM SOLOMON QC (instructed by **Fieldfisher LLP**) for the **Defendant**

APPROVED JUDGMENT

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Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE HALLIWELL:

1. The Defendants apply for an order that the proceedings before me are stayed pending the resolution of their claims against the First Claimant, Smart Choice Metering Limited, in the Employment Tribunal in Manchester.
2. The Defendants' Employment Tribunal claims were issued in November 2019 and January 2020. They came before the Tribunal for determination on 13 July 2020 and were adjourned part-heard. The adjourned hearing has repeatedly been relisted. It appears from the witness statement of James Lappin for the Defendants that, on each occasion, this has effectively been at the request of the Claimants.
3. On the last occasion, it was apparently vacated and relisted because the Claimants' Managing Director, Mr Pilley, made arrangements to go away on holiday during December and, thus, indicated he would be unable to attend the hearing. As I understand it, Mr Pilley is now available to give evidence but it will be done remotely from South Africa. If this has occasioned the Defendants a sense of frustration, it would not be surprising.
4. The adjourned hearing is now scheduled to recommence tomorrow on 12 January 2021 and continue on 13 and 14 January and, if necessary, on 4 and 5 March. In those circumstances, the Defendants seek an order staying the proceedings until their claims in the Employment Tribunal have been resolved. That would include the time taken for the Employment Tribunal to deliver a reserved judgment.
5. In the event that this judgment is subject to appeal, it would logically encompass the time taken to dispose of the appeal because the application

before me is presented on the footing that the Defendants should not be required to file their Defence until the issues before the Employment Tribunal have finally and conclusively been determined and resolved.

6. As Mr Adam Solomon QC in his submissions for the Defendants observes, there is a significant overlap between the issues in the Employment Tribunal and the High Court proceedings before me. In the Employment Tribunal, the Defendants advanced claims against the First Claimant for unfair dismissal. There is an issue as to whether they can establish sufficient continuity of service to found such a claim. No doubt that is a mixed issue of fact and law.
7. The Defendants maintain they are entitled to rely on a concession on the part of one of the First Claimant's witnesses. That issue, as I understand it, remains live. There is also an issue as to whether the Defendants were constructively dismissed. Of course, the issues in the current proceedings have not yet been fully formulated since the Defendants have not served and filed a Defence.
8. In assessing the issue of constructive dismissal, no doubt it will be necessary for the Tribunal Judge to explore issues that will arise in the present proceedings as to whether the Defendants committed repudiatory breaches of their contracts of employment.
9. However, as Mr David Reade QC suggested in his submissions for the Claimants, the High Court proceedings are potentially capable of encompassing significantly wider issues in connection with the disposal of the Defendants' interest in three companies and the conduct of the parties following the transactions. Mr Reade pointed out that two of the parties in the

present pleadings are not parties to the Employment Tribunal claim and they advance claims for breaches of duty prior to the Share Purchase Agreement to which the Employment Tribunal claim does not relate. The Claimants' case in the High Court proceedings is founded on breach of contract, breaches of fiduciary duty and breaches of the Defendants' duties of fidelity and good faith. There is a claim for a contractual indemnity in respect of liabilities, costs and expenses incurred by the First Claimant.

10. Although, the issues in the present proceedings are wider than the issues in the Employment Tribunal claim, Mr Solomon submits that, if and to the extent that the Employment Tribunal determines issues of fact or mixed issues of fact and law, its determination will be binding by issue estoppel upon the parties common to both sets of proceedings.
11. Mr Reade in his submissions at the end of the morning accepted that is so to the extent that the Employment Tribunal arrives at conclusions on those issues which are necessary for it to reach in determining matters falling within the scope of the Employment Tribunal's jurisdiction. No doubt the test is easier to describe than apply and Mr Reade is correct in submitting that the Employment Tribunal can reasonably be expected to exercise caution and discretion when making its decision. However, I also accept Mr Solomon's observation this afternoon that it will not be exclusively concerned to avoid, as he put it colloquially, "stepping on the toes" of the High Court.
12. By Rule 3.1(2)(f) of the Civil Procedure Rules, a power is expressly conferred on the court to:

“... stay the whole or part of any proceedings ... either generally or until a specified date or event”.

13. In the present case, I am invited to stay the proceedings pending a “specified event”, the resolution of the Employment Tribunal proceedings. There is no issue as to my jurisdiction to make such an order and it is by no means unheard of for a court or a tribunal to stay or adjourn proceedings pending the disposal of an issue in another court or tribunal.
14. On the Defendants’ behalf, Mr Solomon referred me to *BUQ v HRE* [2012] EWHC 2827 (QB), in which Tugendhat J vacated a High Court trial pending the determination of the Defendant’s claim in the Employment Tribunal and directed that it be relisted for hearing once the Employment Tribunal claim had been disposed of.
15. Mr Solomon also referred me to an order dated 4 December 2020 from Freedman J refusing permission to appeal from a decision of a High Court Master. Although the Master’s decision is not fully set out in Freedman J’s order, Mr Solomon appeared in that case and was able to explain how it came to be made.
16. Mr Solomon also relies on a decision of the Employment Appeal Tribunal allowing an appeal from the decision of the Employment Judge declining to stay Employment Tribunal proceedings pending the trial of concurrent High Court proceedings.
17. Two features of the present application are distinct or unusual. Firstly, there is no realistic prospect that the present proceedings will be tried in advance of the decision of the Employment Tribunal. That is accepted by everyone. The

present proceedings were only issued on 26 November 2020. Particulars of Claim have been served but the Defendants have not, of course, filed their Defence. The reports of proceedings to which I have been referred each involve the postponement of the trial itself.

18. Another unusual feature of the present case, but not unique, is that it is envisaged the High Court proceedings will be stayed pending determination of the Employment Tribunal proceedings. As I say, that is not unique. In a sense, the *BUQ* case is analogous, albeit the course taken was to adjourn the proceedings rather than to stay them.
19. However, it is implicit in paragraph 17 of Tugendhat J's judgment that, whilst it was unlikely the court would hear further applications until the Employment Tribunal made its determination, the parties could continue to take steps in the High Court proceedings during that period. In any event, the Judge appears to have been satisfied that the Employment Tribunal would be better placed at the final hearing to determine the truth or otherwise of some sexual allegations made by the Defendant.
20. These considerations are not pertinent in the present case since the Defendants seek a stay of the proceedings rather than a direction postponing the date of the trial and there is no realistic prospect of the trial of the present proceedings taking place before the final hearing of the Employment Tribunal proceedings.
21. Shortly before the hearing today, by letter dated 8 January 2021, the Claimants' solicitors, Weightmans, advised Fieldfisher, on behalf of the Defendants, that, whilst they were not willing to consent to a stay, they were willing to provide the Defendants with an extension of time to file their

Defence, and that extension would continue until 19 February, on the basis that they would pay the Defendants' costs of any amendments that might be required if, ultimately required in the light of the Employment Tribunal's determination.

22. This offer was declined by the Defendants' solicitor. In doing so, the Defendant's solicitor observed that it was made on the eve of the hearing and suggested there was no credible explanation for the extension to come to an end only two weeks before the next stage of the adjourned hearing of the Employment Tribunal proceedings on 5 March.
23. Mr Reade has explained before me the underlying logic of the Claimants' offer. In all likelihood, the hearings before the Employment Tribunal will continue in March. The Claimants require the issues to be properly defined by the time the matter comes back before the Employment Tribunal at that stage. This will be accomplished if a Defence is filed within the canvassed timescale.
24. Notwithstanding the formidable skill with which Mr Solomon has presented his submissions, I am not satisfied, in these circumstances, that it would be appropriate for me to impose a general stay on the basis currently sought by the Defendants.
25. Firstly, the proposed stay is not for a fixed time scale which can be calculated in advance. The Defendants seek an order staying the proceedings until resolution of the Employment Tribunal proceedings. Although it is likely this will be after the final date listed for hearing in March, it cannot be predicted with any certainty when the Employment Tribunal will make its decision. If there is an appeal, the logic of the application is that the Defendants should not

be required to file a Defence until the issues in the Employment Tribunal have finally been disposed of. That could well be a significant distance into the future.

26. Secondly, I can fix what appears to be a reasonable time scale for the Defendants to file their Defence and if, for good reason, they require additional time, they can apply for an extension. I will consider any such application on its merits. It will be based on the time that they reasonably need. Although it will ultimately be a matter for the Court in the exercise of its case management powers, the Claimants have already indicated that they would be content for the Defendants to have at least until 19 February 2021, upwards of five weeks from today, to file and serve their Defence. No doubt the preparation of their Defence is likely to be a time consuming exercise, but I have not been provided with reason to believe that there is any compelling need for me to postpone the Defence until after the resolution of the Employment Tribunal proceedings based intrinsically on the preparation exercise itself.
27. Thirdly, whilst it is more than conceivable that, following the delivery of the Employment Tribunal decision, the parties will have to amend or modify their statements of case and additional costs will be consumed, the Claimants' solicitors have offered to be answerable for such costs in their letter dated 8 January. As part of the over-riding objective, I am required to manage cases with a view to saving expense. However, I am also required to ensure that cases are dealt with expeditiously. Bearing in mind the stance taken by the Claimants' solicitors, I am satisfied that the possibility additional costs will be

consumed if I decline to stay the proceedings is outweighed by the immediate case management requirements of the litigation itself and the need for the case to be managed with reasonable expedition.

28. Fourthly, Mr Solomon refers to the risk of unnecessary waste of the court's resources but if I make directions for the Defendants to file their Defence on or before 19 February 2021 or another suitable date - I will hear submissions on when it should be - and, in due course, the case is listed for a CCMC after allowing sufficient time for the parties to accommodate the requirements of the Disclosure Pilot, the need for an additional hearing in relation to the Defendants' Defence will be avoided and the litigation will have progressed. If all issues of case management have to be revisited after the proposed stay – including directions for the delivery of statements of case - it is more than conceivable this will involve the consumption of rather more of the court's resources.
29. Mr Solomon submits that to require the Defendants to litigate in two forums will involve placing improper pressure on the Defendants. I am mindful of the overriding objective for the parties to be placed on an equal footing. I am also mindful of the extent to which the conduct of the Claimants has given rise to the situation in which they now find themselves. However, ultimately, the Defendants will have to engage with the issues in the present proceedings. Whilst, it will obviously be burdensome for the Defendants to be required to deal with this litigation at a time they are also subject to the pressures of the Employment Tribunal proceedings, I am not satisfied that this will somehow put them under improper pressure.

30. Mr Solomon's concerns about the timing of the proceedings are not without justification. It is certainly true that the Claimants should not be permitted to exploit these proceedings as an opportunity to advance their case in the Employment Tribunal. However, Mr Reade advises me that the Claimants are not currently motivated by the opportunity to place the Defendants under pressure and this is consistent with the stance they have recently taken in correspondence. In any event, I can take account of the demands on the Defendants when I exercise my case management powers.
31. From a rather wider perspective, Mr Reade submits that it would be to the advantage of the Employment Tribunal itself and, ultimately, the parties to the present proceedings for the issues in the present proceedings to be properly defined by the time the Employment Tribunal disposes of the claim before it. Contrary to Mr Solomon's submissions, I am not satisfied that there would be anything improper in Mr Reade's solicitors drawing to the attention of the Employment Tribunal any pleadings that are filed within the current proceedings.
32. In all the circumstances, I shall not make an order staying the proceedings but I shall make directions for the delivery of the Defence and I shall now hear from Mr Solomon about the timescale.
