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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
[2022] EWHC 985 (Comm)

No. LM-2020-000247

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 1 April 2022

Before:

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

B E T W E E N :

XL CATLIN INSURANCE COMPANY UK LIMITED

Claimant

- and -

(1) LINKHAM SERVICES LIMITED
(2) DOMINIC JIRJODHAN PERSAD
(3) MICHAEL JON CRANFIELD
(4) RICHARD JOHN GILDEA
(5) INTERNATIONAL MEDICAL RESCUE LIMITED
(6) INTERNATIONAL TRAVEL & HEALTHCARE LIMITED
(7) NEWPORT CAPITAL LIMITED

Defendants

MR J. ENGLAND appeared on behalf of the Claimant.

THE SECOND and THIRD DEFENDANTS appeared in Person.

THE FIRST and FOURTH to SEVENTH DEFENDANTS did not attend and were not represented.

J U D G M E N T

(Via Microsoft Teams)

JUDGE PELLING:

- 1 This is an application by an application notice dated 2 March 2022 for an order that a stay on the Tomlin order I approved on 11 January 2022 be lifted and judgment be entered against each of the second and third defendants, Messrs Persad and Cranfield, in the sum of £300,000 each, together with consequential orders as to interest and costs.
- 2 The Tomlin order made by me on 13 January was in the usual form. It stayed the proceedings in this action as against the second and third defendants upon the terms of a settlement agreement dated 23 December. The settlement agreement contained at para.1: An obligation that each of the second and third defendants, there being separate agreements in respect of each, were to pay the claimant the total sum of £300,000 by four instalments, the first of which was to be paid on 28 February 2022. In default, by para.1(e) of the agreement, if any of the payments were not made in strict accordance with the terms of clause 1(a) of the relevant agreement, then the entire settlement sum, that is to say £300,000 or such part thereof as was outstanding at the date of default, would become immediately due and payable.
- 3 The first instalment, as I say, was due on 28 February. The payment was not forthcoming and, via an email from Mr Persad of 27 February, it was made clear that the payments would not be made, the underlying logic for this being that attempts were being made by each of the second and third defendants to raise capital in relation to their businesses and the plan was that, when money was raised in that way, then funds would then be used in part to discharge the personal liabilities that arise under the settlement agreement.
- 4 In the result, however - and this is accepted by both Mr Persad and Mr Cranfield who appear in person on this application - there was a default under each of the settlement agreements. In consequence of that, the default provision took effect in accordance with its terms and in those circumstances it seems to me beyond argument that the claimant is entitled to, first of all, the stay being lifted and, secondly, for judgment against each of the second and third defendants for £300,000 and there will be judgment accordingly.
- 5 The issues that remain concern interest and concern costs.

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- 6 The two issues that I now have to resolve concern, first of all, interest, in respect of which neither defendant has made any submissions in answer to what Mr England has said. I therefore accept the submissions which are made by Mr England, that is to say that interest at the default rate should accrue on the first instalment from 1 March 2022 being shortly after the accrue due down to day. There should thereafter, because judgment will have been entered, judgment in accordance with the Judgment Act.
- 7 So far as costs are concerned, Mr England, on behalf of the claimant, seeks an order for indemnity costs. The test for indemnity costs is that identified by the Court of Appeal in *Excelsior* and is now universally applied when indemnity costs orders are sought. The question which I have to ask myself is whether the conduct of the defendants in relation to this litigation comes outside the norm to be expected. If the conduct of the defendants goes outside the norm of what is to be expected, then an indemnity costs order follows which means not that there is a penal costs order but simply that the costs are assessed on the basis of what has been reasonably incurred rather than the default standard rate of what is reasonable and proportionate both in amount and work done.

- 8 So far as that is concerned, the point which is made by the claimant is that this was a failure to honour an agreement entered into only very shortly before the first payment was due to be made. Secondly, that the defendants only notified the claimant on the day before the payment was due that it would not be made. Thirdly, no attempt has been made to engage with the claimants for the purposes of agreeing a consent judgment.
- 9 The response so far as that is concerned from the defendants is, first, that they were under the impression that monies would be received as part of an investment they were seeking to obtain and it was only at the last minute that they realised that the investment would not be forthcoming, hence the timing of the email. Prior to that, they thought funds would become available which would enable the payments to be made. Furthermore, no approach had been made by AXA to the defendants for the purposes of obtaining a consent judgment.
- 10 This is an entirely typical, though much to be regretted, feature of commercial litigation where settlement agreements are entered into but payments not made. It is difficult to see how this could be described as coming outside the norm simply because the default was on the first instalment or that the intention not to meet the first instalment was notified late or that there was a failure on the part of the defendants to enter into a consent judgment unless there was correspondence prior to the hearing which demonstrates that that was what they were invited to do, with warnings as to costs consequences if they did not.
- 11 None of those features appear in this case and unless I could be satisfied that there was no real intention to meet the instalments identified in the agreement at the time it was signed, this is simply yet another situation in which a party has been forced to litigate in order to recover the sums which are due to it. If indemnity costs were awarded in every such case, then indemnity costs would become a very much more common feature of commercial litigation in England and that is not the basis on which indemnity costs are to be dealt with.
- 12 In the result, therefore, I direct that the claimant should recover on a standard basis the costs of and occasioned by this application.
- 13 The issue that remains concerns assessment. In the ordinary way, one would have expected an N260 which set out the costs which were being claimed so that a summary assessment could be carried out in accordance with the default provisions contained in the Costs Rules which provide for the summary assessment of all applications, including applications of this sort, which are down to last for a day or less in the interests of saving costs and delay in respect of detailed assessments. In those circumstances, the claimant submits that I should direct a detailed assessment because no costs schedule is available for a costs assessment exercise. I am prepared to direct that there should be such a detailed assessment because, in principle, the claimant should be entitled to recover their costs. However, it is entirely wrong that the defendants should be exposed to the costs of and occasioned by a detailed assessment process in circumstances where the claimant could and should have filed a summary assessment costs schedule.
- 14 In those circumstances, what I propose to do is to direct that whilst there will be a detailed assessment, the claimant should not be entitled to recover the costs of and occasioned by the detailed assessment other than by reference to the conduct of the defendants in such assessment after the detailed assessment has been commenced by the claimant with the intention that the costs of issuing the detailed assessment should not be recoverable but any other costs in the detailed assessment should be dealt with by the costs judge in the usual way.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.