

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Case No. QB-2022-001308

[2023] EWHC 3594 (KB)

The Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 25th April 2023

Before:
MASTER DAVISON

B E T W E E N:

FITTON & CO LTD

and

DUSHYANT KOHLI

MR H DENNER & MR T HOLDEN (Solicitor) appeared on behalf of the Claimant
THE DEFENDANT appeared In Person with Litigation Friend

JUDGMENT
(Approved)

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MASTER DAVISON:

1. I will give a short judgment on this part of the hearing which is the claimant's application dated 11 January for an order that the single joint expert be appointed. There is in response to that application a cross-application by the defendant, seeking to set aside the order by which permission was given for expert evidence. That order was dated 12 August of last year. It is an order that I made on the papers. Paragraph six of it provided for the parties to have permission to rely on the jointly instructed written evidence of an expert chartered tax specialist accountant on the questions of (1) whether and to what extent Phoenix Motorcycle Manufacturing Company Ltd's accounting treatment of sales for the period 1 July 2017 to 30 September 2020 resulted in a VAT shortfall to HMRC; and (2) the quantum of any possible liability to HMRC as a result of such shortfall (if any). (The claim is for breach of the share purchase agreement and the nub of it is that the claimant says that the defendant, who was the seller, had under-recorded the amount of VAT owing to HMRC.)
2. These cross-applications are not the forum to debate whether there has been a breach of the share purchase agreement. Plainly, that is a matter for trial.
3. I have reached the conclusion that it was right to have made the order which I made in August of last year providing for expert evidence because it is alleged that there is a shortfall, or under-recording of VAT. There is at least a *prima facie* evidential basis for that. Without expert evidence, it would be difficult or impossible for the Court to assess the precise extent of that under-recording, if any.
4. Dealing briefly with the principal points made by the defendant. It seems to me to be of limited, if any, relevance that HMRC have not made a demand. That is because it is for the taxpayer to declare the amount of VAT payable correctly and if that has not been done, then it is incumbent on the taxpayer, this being the claimant, to make an amended return and to pay the tax. Further, I agree with the point made by Mr Denner, that if the VAT has been under-recorded, then regardless of the precise legal position between the claimant and HMRC, it will tend to follow that the under-recording has diminished the value of the asset that the claimant has bought. I do not agree with the proposition put to me by Mr Kohli during argument that the figures for the shortfall have been plucked from thin air. It is true that there are different figures in the November 2021 letter and the particulars of claim, but that is because the figures are calculated on the basis of two different periods. The figure in the letter is for the period from July 2019 to September 2020 whereas the figures in the later letter and in the particulars of claim are taken from an earlier point in time, namely 1 July 2017. That, on the face of it at any rate, explains the difference. It also seems to me makes no difference that there is provision for an indemnity in the share purchase agreement which the defendant has signed. It will not be possible to calculate the amount of the indemnity without accurate figures. That, as I have already said, requires expert evidence. Further, notwithstanding what Mr Kohli has said in his skeleton argument and in the hearing, the pleaded position at any rate is that he has denied a liability to indemnify at all.
5. Therefore, for these reasons, I will refuse the defendant's application to set aside the provision for expert evidence and I will uphold the claimant's application with one qualification. If the defendant's case is that it is simply unnecessary to have expert evidence at all, then it seems to me wrong in principle for the parties to be directed to rely on a jointly instructed expert. Apart from anything else, I would anticipate that there would be difficulties in the defendant paying his half of the fees to the accountant. Therefore I will revoke the order for jointly instructed expert evidence and I will give the parties permission

each to instruct their own expert if so advised. It will then be up to Mr Kohli to decide whether he wants to employ, or deploy would perhaps be a better word, expert evidence at all, or whether he is prepared to contest the claim on the basis of the submissions he has already made without recourse to expert evidence.

6. Having decided to proceed in that way, I think possibly the better course is for there to be sequential disclosure of expert evidence. The claimant must provide its expert evidence first and then the defendant can, if he wishes, ask questions and, if so advised, in due course obtain his own expert evidence.
7. That is the process that I think is going to take a little bit of time and plainly the trial date which is June of this year cannot possibly be met. There will have to be a new trial date. I imagine that will be towards the back end of this year and we will in a moment have to have a discussion about dates.

End of Judgment.

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