Neutral Citation Number: [2023] EWHC 3523 (Ch)

Claim Nos. BL-2021-001939 / BL-2021-002082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CH)

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

Date: Tuesday, 28th November 2023

Before:
MR. JUSTICE MILES

- -

Between:

BARCLAYS BANK PLC	**Claimant/ Respondent**
- and -	
(1) SCOTT DYLAN **(2) GARETH MICHAEL DYLAN** **(3) SALLY ANN GLOVER** **(4) DAVID SAMUEL ANTROBUS**	**Defendants**
And between:	
BARCLAYS BANK PLC	**Claimant/ Respondent**
- and -	
(1) OLD3 LIMITED (IN ADMINSTRATION) **(Previously FRESH THINKING GROUP LTD)** **(2) JACK MASON** **3) OLD3 LIMITED (IN ADMINISTRATION)** **(Previously INC TRAVEL GROUP LTD)**	**Defendants**
- and -	
CITIBANK, N.A.	**Non-Party Respondent**
-and-	
GLOBAL INVESTMENT MANAGEMENT HOLDINGS, INC	**Non-Party Applicant**

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MR. IAN SKEATE (Counsel, Direct Access) for the **Applicant**
MR. JAMES KNOTT (instructed by **Eversheds Sutherland**) for the **Respondent**

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Approved Judgment

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MR JUSTICE MILES:

1. This is an application by notice dated 21 November 2023, notified to the respondent the following day, to vacate a hearing fixed in a three-day window commencing on 29 November 2023. That hearing is of an application by the claimant in two sets of proceedings for an order against Citibank NA ("Citibank") under CPR Rule 31.17. Citibank did not and does not object to an order being made. On 3 October 2023 Master McQuail initially granted an order in the terms sought by the claimant on the papers.

2. The documentation sought by the claimant from Citibank relates to the applicant, Global Investment Management Holdings, Inc., a Delaware company ("GIMH"). After the order of 3 October 2023, a number of the defendants and GIMH ("the applicant") objected to the matter having been dealt with on the papers. In particular, it said that it was interested in the order as the relevant documents concerned it and its affairs.

3. As a result of those communications, the Master directed that the matter should be released to a judge and listed for a hearing with a time estimate of two hours on the first available date convenient to the claimant Citibank and the applicant.

4. There then followed correspondence between the claimant, the applicant and the court in relation to the listing of the substantive application, which resulted in three listing appointments, one by email and two which took place remotely or as a hybrid appointment.

5. As I shall explain, the culmination of that process was that on 25 October 2023, Mr. Quinn, the Chief Listing Officer of the Chancery Division, directed that the substantive hearing should take place in the three-day window commencing on 29 November 2023.

6. I will not go through all of the correspondence in detail. It is addressed in a witness statement of Mr. Parry, solicitor acting for the claimant. Very recently, as I will explain, evidence has been served by the applicant, but that evidence does not take issue with what happened at the latter two listing appointments.

7. There was correspondence between the parties that led to the second listing appointment (the first attended one). That took place on 20 October 2023. In the run-up to that appointment, the applicant had indicated in correspondence that its counsel (later was identified as Mr. Walker) was available in the last three days of Michaelmas term, 19 to 21 December 2023. On that basis the claimant requested that the hearing be listed then. The applicant, which was corresponding through a Mr. Adam West, then updated counsel's availability to rule out those three days.

8. At the hearing before the Listing Officer, which was attended by Mr. Walker it emerged that Mr. Walker was not in fact instructed by the applicant but had been instructed in relation to other aspects of the proceedings by the defendants. The Listing Officer accordingly listed the hearing in the window requested by the claimant, 19 to 21 December.

9. The applicant, through Mr. West, complained to the Senior Listing Officer, Mr. Quinn, arguing that the Listing Officer at that appointment had not taken into account the applicant's counsel's availability.

10. Having read the attendance note of the first hearing, I am not convinced that any such mistake was made. But in any case Mr. Quinn agreed that there should be a further listing appointment. That took place on 25 October 2023. It was attended by the clerk

to counsel for the claimant, Mr. de Bono of the claimant's solicitors, and a Mr. Thomas of Barrister4U, an organisation made up of barristers who offer direct access services. Mr. West knew of the hearing, but he chose not to attend himself. The applicant was instead represented at that hearing by Mr. Thomas. At the hearing Mr. Thomas was unable to elaborate on why counsel was unavailable throughout November and December 2023 and January 2024, beyond saying that they were in trial and on holiday without giving any specific dates.

11. Mr. Quinn had explained in an email to Mr. West on 23 October 2023 that he was not prepared to list a two-hour hearing in March or April 2024 without exploring the reasons why the parties could not do earlier. Mr. Thomas was unable to explore these reasons in any specific detail beyond confirming that Mr. Walker was in a trial in the week commencing 18 December 2023 where the application had previously been listed.

12. Mr. Quinn decided that in a situation where the parties were unable to agree availability for a two-hour hearing before March 2024 and with the applicant's side unable to elaborate on the reasons for unavailability in terms of specific commitments for a three-month period he reverted to the first date which the court could do, which was in December 2023, and decided to list the matter in a three-day window from 29 November 2023.

13. He wrote an email to Mr. West later on 25 October 2023 in response Mr. West's complaint about the listing decision. He explained what had happened at the hearing and went on to say: "This application has now had two listing appointments before two different Listing Officers. You have decided not to attend either appointment where the parties' availability has been explored but have written two letters of complaint about the outcome. The hearing date will not now be changed administratively. It is open to you to make an application to the interim applications Court to overturn my decision. Any application made will go before a High Court judge and it is up to them to decide whether a two-hour application should wait for a listing until March 2024. We are able to list any such issued application on three days' notice."

14. Mr. Quinn also noted in his email that Mr. Thomas had confirmed at the fixing appointment that the applicant was yet to instruct Mr. Walker as counsel for the substantive hearing. Mr Quinn explained that notwithstanding this he had sought to accommodate the applicant but ultimately came to the conclusion that the claimant was right that that waiting until March 2024 for a two-hour application was too long.

15. After that decision, various steps have been taken in preparing for the substantive application. The claimant has prepared and served a hearing bundle. The bundle was served electronically on 22 November 2023. The claimant has prepared for the hearing and incurred the costs of counsel for the hearing.

16. The first that the claimant heard of the current application to adjourn was on 22 November 2023, when the clerk to the judge then hearing interim applications contacted the claimant. The current application, which was sealed on 21 November 2023, contains a witness statement in the application notice itself, signed by Adam West, who describes himself as the applicant. He does not state in that document what standing he has to make the application on behalf of the applicant. He does not state that he has any official position within the applicant. Mr. West complained about the decision of the Listing Officers. For some reason he did not refer to the hearing on 25 October 2023 in terms. He also suggested that there had been an earlier decision of Deputy Master Henderson which required that the hearing should take place between December 2023 and April 2024.

17. There was some further correspondence late last week where the question arose whether Mr. Walker was available for this hearing. In the course of that correspondence, which I need not go into in detail, it became clear that even as at 24 November 2023, Mr. Walker had not been instructed by the applicant in relation to the substantive application.

18. Early this morning, a witness statement from Mr. West and a witness statement from Ms. Kerkhove were served on the claimant's solicitors. In his statement, Mr. West describes himself as an Authorised Officer of the applicant. He does not state that he is a director of the applicant, and nor does he explain what is meant by an Authorised Officer. He sets out some of the history, including the recent history. He does not take issue with the claimant's evidence about the events at the two listing hearings that I have already referred to.

19. Mr West says in general terms that the listing appointments ignored the directions of Master McQuail and Deputy Master Henderson. He repeats that the applicant would wish to instruct Mr. Walker as counsel. In paragraph 29 he describes Mr. Walker as the chosen counsel for the applicant. He says that Mr. Walker has specialised knowledge from his heavy involvement in the proceedings, having read thousands of documents and taken detailed instructions both in writing and in conferences. Mr West says that in the course of the litigation Mr. Walker has developed an in-depth understanding of the case's complexities. He also says that Mr. Walker possesses specific expertise in non-party disclosure orders and banking disputes.

20. He does not say that Mr. Walker has in fact been instructed at any stage by the applicant in relation to the non-party disclosure order application. However, in paragraph 30(c), he says that Mr. Walker's ongoing involvement ensures strategic continuity and that he has been instrumental in shaping the legal strategy of the applicant's defence from the outset.

21. It is not easy to follow this aspect of the evidence. In part Mr. West appears to be suggesting that Mr. Walker has been instructed by the applicant - but Mr. West never actually says when Mr Walker was instructed by the applicant or in respect of which matters. Moreover, in the evidence of the claimant, the question of Mr. Walker's instructions is directly put in issue and Mr. West does not address this.

22. Mr. West goes on to say that the substantive application is an unusual one, that it is complex and that it involves a number of issues. He asks the court to reschedule the matter for a date from February 2024 onwards. He says that that would be a fair and just outcome.

23. The evidence of Ms. Kerkhove states that she has been a director of the applicant since its incorporation on 1 April 2022. She says in her statement that Adam West is also a director of the applicant and that Mr. Scott Dylan was a director of the applicant for a short period of time but has since resigned.

24. Counsel for the applicant stated that, based on a certificate of incorporation stamped on 4 May 2022, he had satisfied himself that the directors of the company as at that date were Ms. Kerkhove, Mr. West, Mr. Scott Dylan and Mr. Daryl Dylan, and that he had satisfied himself that Mr. Daryl Dylan was currently a director and the agent for the applicant in this jurisdiction.

25. There are however reasons for at least being concerned about the status of these various individuals in relation to the applicant. The Companies House filing for the applicant as a foreign company only mentions one person as a managing officer, namely, Ms. Kerkhove.

26. Moreover, in a recent letter from the applicant, Ms. Kerkhove says that she is "the Director". She did not say in terms that she is the sole director, but it is a surprising form of words to have used if there is more than one director. As I have said, Mr. West does not say in his own witness statement or in the application notice that he is a director of the applicant.

27. Moreover, this point has been expressly raised in the evidence and it does not appear to me that the documents which have been filed to date deal with the concerns raised by the claimant, at least conclusively.

28. However, it does not appear to me that I should dismiss the application only on the ground that the status and standing of Mr. West to sign the application is unclear. The applicant is represented by counsel and I shall consider its merits.

29. In support of the application counsel for the applicant says the fundamental task for the court is to ask whether the hearing listed for the three-day window commencing on 29 November 2023 can fairly go ahead. He submits that it has been clear for some time that Mr. Walker is the applicant's favoured counsel and that he is not available for that window. He also points out that the applicant served this morning a bundle of some 3,000 pages of documents which it says are relevant to the substantive hearing.

30. He submitted that the substantive application raises complicated issues concerning his client's status as the party who, in substance, is affected by the order. He said that the two-hour time estimate is inadequate and that a day is required. He submitted that the real question should be whether the claimant would be prejudiced by the postponement of the substantive application and that that was ultimately a matter of costs. He submitted that the Listing Officers had not followed the orders of the Masters, that is to say Master McQuail and Deputy Master Henderson, and that it would be unfair on the applicant were the matter now to proceed. It would not be possible now to change counsel, and the upshot will be that the applicant will have been deprived of the services of its chosen counsel, namely Mr. Walker.

31. He says that any delay in bringing the application is not entirely the fault of the applicant. He blames the claimant for raising the question of Mr. West's status, which took some time to deal with, and he also says that the way the court's Listing Officers have dealt with the matter is, at least, irregular.

32. Counsel for the claimant submitted that the position of Mr. West remained clear but did not invite the court to dismiss the application on that basis. He submitted that the premise of the application namely that the listing process is procedurally flawed, is itself unsustainable. The Listing Officers properly asked about counsel's availability. Although the applicant said that they wanted Mr. Walker to represent them, they never said that he had been instructed, and even now the evidence does not suggest that he has been instructed. There is no challenge to the evidence of the claimants as to what took place at the two listing appointments. At the first Mr. Walker himself appeared and said he was not instructed by the applicant. At the second Mr. Walker had still not been instructed and the representative of the applicant Mr. Thomas was unable to provide the Listing Office with proper details as to his lack of availability. it is not said that Mr. Walker has somehow been generally instructed, albeit the evidence on that is confusing. The Listing Office has given the applicant two separate opportunities to make submissions and has properly given the applicant a chance to seek dates when counsel would be available.

33. Counsel for the claimant submitted that the suggestion in the application notice that the orders of the Listing Office were contrary to the order of Deputy Master Henderson has no weight because in the relevant email all that Deputy Master Henderson said was that in addition to the dates which the claimant had already

provided, which were up to the end of November 2023, it should now provide dates from December 2023 to March 2024.

34. Counsel for the claimant submitted that in fact the evidence as to why Mr. Walker's evidence was so important was without any real force. There is no reason why other counsel should not have been instructed to appear on behalf of the applicant at the hearing. Counsel for the claimant submitted that there would be real prejudice were the matter to be adjourned. There would be the disruption to the court's own diary. The claimant was entitled to have the application heard reasonably expeditiously, like any other litigant. It would be an inefficient use of the court's resources were the matter now to be moved. Moreover, the claimant would not be fully compensated for its costs. That is partly because under any assessment there is always some shortfall, but also the claimant may have difficulties in enforcing any order for costs against the applicant. The applicant is incorporated overseas and there is no evidence as to its resources. If there is any prejudice to the applicant, it is of its own making.

35. Moreover Mr. Parry has put in unchallenged evidence that in other proceedings the applicant has been able to instruct other counsel. Standing back, the claimant should not be required to wait six months for a short hearing and that is essentially the position that was taken by the Listing Office.

36. My conclusions are as follows.

37. First, I reject any suggestion that the decisions of the Listing Office are in any way irregular or flawed. At both hearings the applicant had a full opportunity to make submissions and argue for a later listing, which indeed it did. At the first attended hearing Mr. Walker himself explained that he was not instructed by the applicant and, in those circumstances, there being no evidence of any other counsel who was instructed, the Listing Office reasonably came to the conclusion that the applicant's counsel's availability was irrelevant. At the second hearing, Mr. Quinn specifically invited submissions from the representative of the applicant as to why no date was available in November or December. The representative said at that stage that counsel (who must have been Mr. Walker) was not available due to a trial and being on holiday, but gave no specific dates or reasons. Mr. West knew of that hearing and decided not to attend it. The decision that the Listing Office came to was entirely reasonable in the circumstances. The Listing Office was not prepared to put off a short hearing of this kind for many months simply because the applicant wanted to instruct Mr. Walker, who, on the information provided at the hearing, had not yet even been instructed by it.

38. That was, as I say, an entirely rational listing decision. It was open to the applicant at that stage to instruct other counsel. It had more than adequate time to do so. I reject the submission that this is an unusually complex or difficult matter or that Mr Walker has unusual levels of expertise in orders of this kind. They are commonplace in business cases. It seems to me that there is any number of other barristers who could have got ready for a hearing in late November and that there is no evidence that it was not possible for the applicant to find other barristers in the period after 25 October 2023.

39. The next point is that this application has been made way too late. Mr. Quinn explained in the email of 25 October 2023 that if it was dissatisfied with the court's decision, it was open to the applicant to apply to the Interim Applications Court to overturn the decision, and he explained how that could be done. There is no evidence before the court to explain why no such application was made shortly after 25 October 2023, and why the applicant waited until 21 November 2023 to issue the application, and even then did not inform the claimant of that application. In the absence of any explanation for the failure to make the application until the week before the hearing

window, it seems to me that any prejudice which the applicant may now be facing is entirely of its own making and it cannot now complain about any difficulty it may find itself in in finding other representatives.

40. Nor do I think that the reliance on the service of some 3,000-odd pages of documents takes the applicant any further. The applicant was required under the Chancery Guide to serve any evidence in response to the application by 8 November 2023. It has chosen to put in a bundle of 3,000 pages so very late in the day and just before the hearing. It cannot rely on that to seek to move the hearing.

41. Next I reject any suggestion that the email from Deputy Master Henderson suggested that there should be a hearing window between December 2023 and March 2024. That is based on a complete misreading of the relevant email. All that was saying was that the claimant should give further dates when its counsel was unavailable for December through to March. It was not saying that that was when the hearing should take place.

42. I reject the submission of the applicant's counsel that the question for the court is whether now the hearing can fairly go ahead and whether the claimant can be compensated in costs. The question for the court is whether in compliance with the overriding objective, a hearing which has been fixed since 25 October 2023 for both parties should now be adjourned in the run-up to that hearing. The overriding objective requires the court to deal with cases justly and at proportionate cost. That includes ensuring that the parties are on an equal footing and can participate fully in the proceedings, that expense will be saved, ensuring that the matter is dealt with expeditiously and fairly and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases, and enforcing compliance with rules, practice direction and orders.

43. The question is whether the court should now adjourn a hearing which has been fixed since 25 October 2023. For reasons already given, I consider that this application has been made way too late and that is a very powerful factor against an adjournment. In addition, to grant an adjournment now would be highly disruptive, both to the claimant and to the court's own diary. Listing works by hearings being placed in the diaries in advance so that the parties they may know what dates they are working towards and make appropriate preparations. Equally the listing process allows the court to allocate resources efficiently, not only to the current case but to other matters. An adjournment of the kind sought by the applicant would lead to an inefficient use of the court's resources.

44. The question is not, as counsel suggested, whether the claimant could be adequately compensated in costs. That is one factor to take into account. But just as importantly, the court takes into account the disruption to the efficient conduct of these and other proceedings.

45. In any event, it seems to me that counsel for the claimant is right to say that there is uncertainty about the extent to which any costs order could effectively be enforced against the applicant or satisfied by it.

46. As I have already said, any prejudice to the applicant is entirely of its own making and it has no grounds for complaint.

47. Indeed, it appears to me that this application is wholly without merit, and I shall so certify.

48. I also note counsel for the applicant's contention that two hours is not enough. I am not persuaded that that is necessarily the case. However, I have made enquiries of the Listing Office and, if necessary, they will make a day available within the existing

hearing window. That is not to that say that the parties should necessarily take up that time, but it addresses that particular concern raised by the applicant.

49. The claimant seeks its costs of this hearing and also the costs of the earlier processes relating to the listing of the substantive application. I am not persuaded that it is appropriate to make an order for costs in relation to the earlier stages. It seems to me that those costs will be dealt with in the usual way. There had to be listing applications and they will be dealt with as part of the costs no doubt of the proceedings.

50. As to the application dated 21 November 2023, there is no dispute about the principle of the incidence of costs.

51. The claimant seeks costs on the indemnity basis on two main grounds: first, that in my judgment I said that the matter was totally without merit; and secondly, that within the email of 25 October 2023, Mr. Quinn spelt out to the applicant what steps it should take if it was dissatisfied with the decision and those steps were not taken until 21 November.

52. I am satisfied that this is a case for indemnity costs essentially for the reasons given by the claimant. I do not think that the answer given by the applicant's counsel that the application was in good faith and was made properly is really an answer. It seems to me this is well outside the norm of ordinary commercial litigation in these courts and that an order for indemnity costs is justified.

53. The Claimant seeks a total of £21,905.48 including VAT. There is an error in the costs statement in that Mr. Parry and Mr. Lingard are referred to as grade A but it is clear from the narrative that they are in fact grade B lawyers. The applicant's counsel says that the amount of costs is unreasonable. He says that all of the work should essentially have been undertaken by a grade B fee earner and that the hourly rate should have been no more than £250. He also says that the time spent on the preparation of documents is excessive. He says that there was no need for a partner to attend at the hearing and that also counsel's fees for what was listed as a short application for an adjournment are excessive and that a proper fee would have been in the order of £3,500.

54. Having concluded that the indemnity basis is appropriate, the burden is on the paying party to show that the costs have not been reasonably incurred. It appears to me that there is some force in some of the points made by counsel for the applicant. It does appear to me that most of the work undertaken by the partner could have been undertaken by more junior solicitors in this case, and it also appears to me that the overall time taken in preparing the documents may be considered somewhat on the high side. I also think that there is some force in the argument that on a short hearing of this kind for an adjournment counsel's fee can be seen as slightly on the high side. On the other hand, I do note that this hearing has now occupied the time of the court for almost three hours. Counsel for the applicant himself took over an hour in making his submissions, so it was always likely to take rather more than 45 minutes. Moreover, as counsel for the claimant observed, it was necessary for his clients to set out the full history in an accurate way as the evidence contained in the application notice from Mr. West was not accurate and complete in all respects.

55. Making allowances for the points made by counsel for the parties, I shall order that the applicant shall pay costs summarily assessed at £15,000, to include VAT.

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