

[2021] EWHC 978 (Comm)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)



No. CL-2020-000786

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 19 March 2021

Before:

THE HON. MR JUSTICE BRYAN

B E T W E E N :

JAMES FISHER EVERARD LTD & TWO OTHERS

Claimants

- and -

EUROPEAN DIESEL SERVICES

Defendant

MS S. PARUK (instructed by Campbell Johnston Clark) appeared on behalf of the Claimants.

MR P. LAND (instructed by Kuit Steinart Levy LLP) appeared on behalf the Defendant.

A P P R O V E D J U D G M E N T

MR JUSTICE BRYAN:

1 There is before me today an application for an extension of time in relation to service of the defence in this action until 17 May 2021. In this regard the claimants' solicitors emailed the defendant's solicitors on 7 December, providing their Claim Form and Particulars of Claim, enquiring if they were instructed to accept service, and service was then promptly effected on 14 December 2020. The application for an extension of time is opposed by the claimant on the basis, it is said, that more than enough time has already passed in order to facilitate the service of the defence, and the length of time sought is alleged to be unparticularised in terms of why such extra time is needed.

2 This application for an extension of time to serve the defence was made before the time for service of the defence has expired, and so is an “in-time” application for an extension of time to serve the defence (rather than an application for relief from sanctions), and is what was once known as a “time summons” and the sort of matter that would once have appeared in the Friday List upon which Junior Counsel cut their teeth. However, contested oral hearings of applications for extensions of time to serve statements of case are a relatively rare beast post the Civil Procedure Rules, still less in the Commercial Court where such matters are routinely resolved between commercial solicitors (with approval of agreed orders by a paper applications judge).

3 However, the applicable principles are well known. Under CPR 3.1(2)(a) the court has a general power of management. CPR 3.1(2)(a) providing:

"Except where these Rules provide otherwise, the court may:

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)."

The applicable principle to be applied in relation to such case management is the overriding objective in CPR 1.1, and in particular CPR 1.1(2):

"Dealing with a case justly and at proportionate cost includes, so far as is practicable:

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

I would add that para.(f) was added in the wake of the CPR and the *Mitchell* principles.

4 Oral applications to extend time are relatively rare in the Business and Property Courts and one of the reasons for that is that the applicable principles have been identified in previous

cases and are well-known. One such case is that of *Re Guidezone Limited* [2014] 1 WLR 3728 and the cases there cited. By way of example in *Smailes & Anor v. McNally & Ors* [2013] EWHC 1562 (Ch), Henderson J granted an in time application for an extension of time for disclosure. That was a case before *Mitchell* but Henderson J addressed the impact of these changes to the overriding objective and said at [52]:

"... the court will scrutinise an application for an extension more rigorously than [before the Jackson Reforms] and that it must firmly discourage any easy assumption that an extension of time will be granted if it would not involve any obvious prejudice to the other side."

He continued, and I quote:

"53. On the other hand, I think it is important not to go to the other extreme, and not to encourage unreasonable opposition to extensions which are applied for in time and which involve no significant fresh prejudice to the other parties. In cases of that nature, considerations of cost and proportionality are highly relevant, and the wider interests of justice are likely to be better served by a sensible agreement, or a short unopposed hearing, than by the adoption of entrenched positions and the expenditure of much money and court time in preparing for and dealing with an application that could have been avoided.

54. I would also observe that, although all court orders mean what they say, and must be complied with even if made by consent, there are some orders relating to the completion of specified stages in preparation for trial (such as disclosure, the exchange of witness statements or a timetable for expert evidence) where there may still be so many imponderables when the order is made that the date for compliance cannot sensibly be regarded as written in stone.

Everything will always depend on the circumstances of the particular case, and the stage in the proceedings when the order is made, but in many such cases it should be understood that there may be a need for reasonable extensions of time or other adjustments as the matter develops. It would, I think, be unfortunate if the new and salutary emphasis on compliance with orders were to lead to a situation where, in cases of the general type I have described, a reasonable request for an extension were to be rejected in the hope that the court might be persuaded to refuse any extension at all."

- 5 In the case of *Summit Navigation Ltd & Anor v. Generali Romania Asigurare Reasigurare SA Ardaf SA & Anor* [2014] EWHC 391, Leggatt J, as he then was, not in the context of an application for an extension of time but an application for the lifting of stay and security for costs that had not been provided in time, criticised the defendants for seeking to rely on *Mitchell v. News Group Newspapers Ltd* [2013] EWCA Civ. 1537 to turn to their tactical advantage to claim a short delay in providing security by arguing that the action should be permanently stayed. At [53] he referred to the defendants as not having adopted a constructive approach but having, "cited *Mitchell* and cried foul."

At para.54 he continued:

"The defendants' stance disregarded the duty of the parties and their representatives to cooperate with each other in the conduct of proceedings and the need for litigation to be conducted efficiently and at proportionate cost. It stood *Mitchell* on its head."

6 In the case of *Re Guidezone Ltd*, as I have referred to, at [49], Nugee J said this, and I quote:

"The consistent message from these authorities is that a party who needs more time for a procedural step in existing proceedings should not just ignore the problem but should ask the other side for consent, and if consent is not forthcoming, should make an in-time application for an extension; and conversely that the other side should respond positively and in a spirit of co-operation to reasonable requests for consent rather than 'cry foul' and seek to take opportunistic advantage of the other party's difficulties."

7 In that case Nugee J also said, amongst other matters, as follows at [69]:

"I accept entirely Mr Jones's submission that the absence of any significant prejudice to the other party is no longer to be regarded (if it ever was) as sufficient reason by itself to grant an extension of time regardless of other considerations. But it does not seem to me to follow that it has ceased to be of any relevance. Dealing with the case justly in my view requires the court to weigh up the respective

disadvantages to both sides of granting or refusing the application, and the fact that there is no, or no readily discernible, disadvantage to Dilip in granting the extension, and potentially overwhelming prejudice to the respondents in refusing it, is to my mind a very material consideration."

Then at [75], he said as follows:

" That leaves sub-paragraph (f), which I will set out again for the sake of convenience:

'... enforcing compliance with rules, practice directions and orders.'

I have already said that the message I discern from the cases is that parties should respect the rules and orders of the court and if they get into time difficulties should ask the other party for consent to an extension, and failing that make an in-time application for an extension. This is what the respondents have done, and they are not to be treated as if they were in default and applying for relief from sanctions."

Then at [76]:

"However I accept that the new culture exemplified by *Mitchell* means that parties cannot expect to get an extension

simply by asking for it. **They do have to explain to the court why they need it, and the court will scrutinise the reasons put forward. Here that means looking at why the extension was sought.**"

(emphasis added)

8 Dealing first with the underlying facts of the dispute, before turning to the chronology and the application for an extension of time, this action concerns two vessels, the Mersey Fisher and the Thames Fisher which, per the Particulars of Claim, the first and second claimants were the registered owners of, with the Thames Fisher being on bare boat charter to the first claimant from the second claimant. It is said that the third claimant was the technical and crew managers of the vessel. They are fitted with diesel engines and manufactured by Ruston Diesels. It is said that the defendant was, and/or held itself out to be, a specialist in the maintenance and/or repair and/or supply of spare parts for engines manufactured by Ruston Diesels.

9 In short, in 2016 there were failures following renewal of a lubricating oil pump and associated gearing of the Mersey Fisher, and then a further failure of the Mersey Fisher in April 2016. Repairs were carried out by the defendant and a pump was replaced. There are issues as to the precise terms on which such repair works were carried on. But in any event on 11 May 2016, whilst in service in the Cromarty Firth, there was a failure of the main engines and it is alleged that either the parts that were supplied were defective and/or there was a lack of skill and care in relation to the installation of such parts on the part of the defendant.

- 10 Similarly in relation to the Thames Fisher, there had been a replacement of a seawater pump by the defendant in February 2016; again there are issues as to the precise terms on which that was carried out. But in July 2016 the seawater pump failed on that vessel whilst the ship was on a voyage from Fawley to Aberdeen. Again the allegation is that there were either non original parts or defective parts, or there was a failure to exercise proper skill and care in relation to the installation of such parts.
- 11 It will be seen, therefore, that the issues that arise include issues on which expert evidence from a marine engineer will be needed. Indeed, there have been metallurgical analyses in relation to the gears supplied by the defendant and that has led to the allegations that they were not original manufacturing parts and also had not been heat treated in accordance with the manufacturer's requirements.
- 12 It will be apparent, therefore, that no doubt in order to properly plead the claim in relation to the Particulars of Claim and also to properly respond thereto, it will be necessary for expert evidence to be obtained, albeit, no doubt, that the defendant as a company which specialises in such areas will have some expertise of its own. So that in essence is the nature of the claim set out in the Particulars of Claim.
- 13 In terms of the history of the matter, between 6 April 2018 and 15 February 2019 the parties engaged in pre-action correspondence. The last aspect of that from the claimant was on 12 December 2018, although there was a subsequent letter from the defendant on 15 February 2019 in which further information and documentation was sought. That letter was not responded to at that time and such correspondence would appear to have petered out, with the defendant subsequently saying that it closed its file in due course. It was after two years, almost, that, as I say, on 7 December the claimants emailed the defendant's solicitors

providing a Claim Form and Particulars of Claim and enquiring if they were instructed to accept service; with service being effected on 14 December.

14 It is fair to say, therefore, that the defendant faced something of a standing start having not been forewarned that the issuing of proceedings was intended and imminent. In any event, by 23 December the defendants had written to the claimant expressing surprise about the claim having been served, as it is put now "out of the blue," and particularly in the context of the fact that the letter on 15 February 2019 had not been responded to. It was said that the defendant's expert would need to undertake investigations before a meaningful defence could be prepared, and the defendants proposed a three months stay from service which would be to 14 March 2021 - we are now of course on 19 March 2021 - for the parties to exchange information and conclude the protocol identifying that thereafter a further extension of time might be required before a defence could be settled. In the meantime the defendant asked the claimant to agree to extend the time for the defence by the 28 days that is contemplated in the Commercial Court Guide.

15 The claimant was not prepared to agree a stay, a stance it was entitled to adopt, and the matter proceeded with the instruction of an expert, I am told, on 10 December. The expert was asked what documentation would be needed and the like. The Christmas period intervened and then unfortunately the expert had to have emergency surgery, which took matters to the middle of January, and I was told that by the end of January the expert had responded in relation to what information was required.

16 It will be seen, therefore, that some seven weeks on, as at 19 March 2021, no overt progress had been made in terms of advancing the defence and, as I say, what is sought now is an extension of time until 17 May. Although the application is supported by a witness

statement from Mr Wilton dated 9 February, and opposed in a witness statement of Mr Johnston of 24 February 2021, it would be fair to say that the witness statement of Mr Wilton does not descend into any great particularity, as to precisely why particular amounts of time are required, and indeed what has happened to date. In particular some seven weeks have now expired since the defendants were told by their expert as to what documentation was required.

- 17 Mr Land, who appears for the defendant, was therefore asked by me to take instructions from his clients as to what steps had been taking place and what time was needed time between now and when a properly particularised defence could be served. This fact in itself, I consider, illustrates that more information could have been provided as contemplated by Nugee J in the case that I have cited. Indeed had this matter proceeded, for example by way of consent or indeed by way of a paper application, which is another route that could have been adopted, then the judge considering either a consent order or a contested application, but on paper, would have required such information as well.
- 18 In short, I am told that the documentation is still being collated. There have been difficulties because two of the main individuals involved have been working abroad, and also two members of staff have had to self-isolate. The position therefore is that the bundle of material the expert requires is still not ready. It is thought that up to another two weeks are needed to assemble that material. It is then said that the expert will need three to four weeks in order to provide an expert's report, following which Mr Land considers realistically that he will need another seven days in which to finalise the defence. Mr Land made clear that he is working on the defence in the meantime, and there are clearly other aspects of the defence which can be worked on in the meantime.

- 19 For her part, Ms Paruk, who appears on behalf of the claimant, says that the defendant has not been acting expeditiously, that there was an initial extension of 28 days and that by the time that extension had expired the defendant should have been in a position to serve its defence. She says that in response to a point that the court made - which I am going to come on to in a moment - which is essentially that what the court wants is a properly particularised defence so that the issues can be crystallised, and a proper list of issues and case memorandum can be drafted so that an effective case management conference can take place without further pleading stages, she submitted, "Do not let the best be the enemy of the good." In other words it ought to be possible to prepare a properly particularised defence without holding out for extra time to give the utmost level of particularity.
- 20 She also submits that the requirements of the CPR are there to be complied with and in terms of the amount of time that is contemplated under the CPR, what is contemplated is 28 days for a defence with the opportunity to agree a further 28 days, which was agreed to. If you want any more time than that you really have to justify why it is you require any more, still less substantially more.
- 21 I have some sympathy with the position of the claimant in terms of the amount of time that has passed, and also in terms of the very limited progress that seems to have been made in relation to the service of a defence. I have no doubt that a short form defence could be put in within relatively short order, which would be sufficiently CPR compliant not to be capable of being struck out.
- 22 However, that is not what the Commercial Court would want, or expect, of a defence. The defence should be sufficiently particularised so that the true issues are identified, the true expert issues are defined between the experts, and the matter can proceed after a reply to a

case management conference at which the true list of issues can be finalised. The present case is, by Commercial Court standards, a relatively modest case in terms of the amount that is claimed and if there were to be repeated amendments to the pleading as further expert evidence emerged, and the like, then costs could rapidly become disproportionate to the value of the claim.

23 Whilst I have full regard to the passage of time that has already taken place, I consider that I must look at what time is now necessary in order for a properly particularised defence to be provided. In the light of the information that has been provided to me orally at this hearing, I consider that the defendant should be given a short further period of time, during which to obtain the material, to which then should be added a period of time for the expert to respond with the expert's comments. I agree with Ms Paruk that time for service of a full report is not needed. What is needed is commentary from the expert in sufficient detail in order for the defence to be properly particularised, and then a short period of time for the defendant's counsel to finalize the defence.

24 I consider that all those three stages - i.e. the obtaining of the material for provision to the expert, the expert providing his comments and a defence, and a properly particularised defence being provided, ought to be capable of being dealt with within five weeks, set against the backdrop of the delay in progressing the defence to date.

25 Accordingly, I am prepared to extend the time for service of the defence until a date five weeks from today, which I will confirm with the parties in a moment. I will not make that an unless order. But I will make clear that in my view one would need a change of circumstances to arise for there to be a justification for any significant extension thereafter. In other words, if there were to be an extension it would have to be substantiated and

justified by hard evidence at that stage. The defendant would be well advised to proceed on the basis that it should be providing its defence by that date because it would be at the mercy of the court as to whether any further extension was granted.

26 Accordingly, for those reasons, I accede to the application for an extension of time but limited to the timescale that I have identified.