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Case No: CL-2023-000137

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
COMMERCIAL COURT

7 Rolls Building
Fetter Lane, London
EC4A 1NL

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Before:

THE HONOURABLE MR JUSTICE BUTCHER

Between:

CETO SHIPPING CORPORATION
- and -
SAVORY SHIPPING INC

Claimant

Defendant

MARK LAKIN (S) (instructed by **Stephenson Harwood LLP**) for the **Claimant**

OLIVER CAPLIN KC (instructed by **Waterson Hicks**) for the **Defendant**

Approved Judgment
.....

MR JUSTICE BUTCHER

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MR JUSTICE BUTCHER :

1. The Defendant, Savory Shipping Inc. (“Savory”) applies under CPR r 3.4.2(c) for a contingent order to strike out the damages claim made by Ceto Shipping Corporation (“Ceto”), which is part of a wider claim in these proceedings advanced by Ceto, unless Ceto within seven days: (1) puts up the security for costs which has been ordered that it should put up in relation to that damages claim; and (2) pays two outstanding interlocutory costs orders which have been made against it.
2. There are thus three orders which are relevant.
3. The first of those orders is an order which was made by Mr Justice Andrew Baker on 21 October 2022 whereby he dismissed a Part 8 claim brought by Ceto against Savory for declaratory relief. On his dismissing that claim, he ordered Ceto to pay the costs and quantified those costs, I think, in the sum of some £76,000.
4. The second order is one for security for costs. That was made by Mr Hollander KC, sitting as a Judge of the High Court, in November 2023. Ceto was ordered to provide security in respect of the damages claim, but not of the wider claim, in the sum of £75,000 in three tranches on 15 January, 1 May and 1 October 2024. In the course of his judgment in relation to that application, Mr Hollander KC rejected an argument that the ordering of such security would stifle the claim as a result of Ceto’s impecuniosity.
5. The third order is again one of Mr Justice Andrew Baker, made in March of this year, whereby he granted Savory an anti-suit injunction against Ceto restraining Ceto from pursuing proceedings in Singapore which sought essentially the same relief as that which it is seeking in this jurisdiction, and Mr Justice Andrew Baker made an order in these proceedings that Ceto should pay costs in the sum, I think, of some £41,500.
6. None of those amounts, that is to say, the Baker Part 8 costs, the Baker anti-suit injunction costs or the first and second tranches of the security for costs have been paid by Ceto.
7. The legal principles which are relevant are not essentially in dispute. Under CPR r 3.4.2(c)(ii):

“The court may strike out a statement of case if it appears to the court:

...

c) That there has been a failure to comply with a rule, Practice Direction or court order”.

In the case of orders for the payment of costs, there is a well-known ability on the part of the court to order that a case may be struck out if there is not the payment of an adverse costs order. This is to ensure that the costs orders which the court makes are complied with. Of course, the court will only impose that sanction in an appropriate case, but it is a sanction which is available to the court, as is indeed stipulated in CPR r 33.4.2(c).

8. In the case of security for costs, the principles can be said to be analogous. The appropriate approach to sanction was considered by Sir Richard Field in *Michael Wilson & Partners v Sinclair* [2017] 5 Costs Law Reports 877 at paragraph 29, which was adopted and approved by His Honour Judge Pelling KC more recently in a case concerning the mandatory provision of security in the maritime letter of indemnity context namely *Aramco Trading Fujairah FZE v Gulf Petrochem FZC* [2021] EWHC 2650 (Comm) at paragraph 18, where he said:

“1. The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court’s inherent jurisdiction.

2. The court should keep carefully in mind the policy behind the imposition of costs orders being made payable within a specified period of time before the end of litigation, namely that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.

3. Consideration must be given to all the relevant circumstances, including:

a) The potential applicability of Article 6 of ECHR;

b) The availability of alternative means of enforcing the costs order through the different mechanisms of execution;

c) Whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question and, where no such submission was made, whether it ought to have been made, or there is no good reason for it not having been made.

4. A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or a breach of Article 6 of the ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness’s financial position including his or her prospects of raising the necessary funds where his or her cash resources were insufficient to meet the liability.

5. Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.

6. If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order”.
9. In the present case, it appears to me that there is a strong case that there should be an unless order. I will come in due course to what the terms of that unless order should be, and I will not be making it conditional on the payment of the relevant amounts within seven days. However, it does appear to me that this is a case in which there ought to be an unless order.
10. There has been a clear breach by Ceto of the payment of two of the tranches of security for costs. Ceto has no available argument that it cannot comply with those orders by reason of impecuniosity, which was an argument rejected by Mr Hollander KC and, it appears to me clear, as Savory submits, that Ceto can find money, including for legal representation, when it wants to, but has not found it for these payments for security for costs because it does not choose to.
11. There is also the clear failure on the part of Ceto to pay the Baker Part 8 costs and the Baker anti-suit injunction costs. True it is that the Part 8 costs were in different proceedings, in the sense that they had a different action number, but the Part 8 claim was between the same parties and related to the same subject matter. In any event, the anti-suit injunction costs were ordered in these proceedings and have not been paid.
12. It seems to me that this is a case where Ceto has brought a Part 8 claim which was unsuccessful and has brought the anti-suit injunction costs upon itself. The ordinary consequence of those matters is that it should pay the costs of each and it should pay them promptly if it wishes to continue with its claim.
13. There is no good reason to believe that Ceto cannot pay those costs. As I have said, Mr Hollander KC rejected Ceto’s plea of impecuniosity and the suggestion that such impecuniosity would lead to the stifling of the claim in his judgment on security for costs.
14. As to the fifth of the matters referred to by His Honour Judge Pelling, KC in *Aramco*, Ceto has no assets in the jurisdiction and the consideration is therefore one which tells in favour of the court requiring the payment of the costs orders as the price for Ceto’s being allowed to continue with the proceedings unless there are strong grounds for not so ordering.
15. The arguments which Ceto has advanced against the imposition of a debarring sanction are essentially twofold. The first is that it offered to stay its damages claim pending the determination of Ceto’s claim with permission to apply to lift the stay thereafter. Alternatively, that that might be an appropriate course for the court to adopt.
16. In my judgment, that type of stay of the damages claim would not, simply on case management grounds, be a satisfactory course. It would involve a bifurcated trial procedure with increased time and costs for both parties, a delay in the final resolution of the dispute and increased claims on the court’s resources. That is a matter which is unappealing in terms of the management of the case and is not a course which the court would, as I apprehend, have ordered on an application for such a direction. It is not a

case management arrangement which should be imposed by reason of Ceto's failure to comply with the order in relation to security for costs.

17. The other aspect of Ceto's objection to the application is to say that Mr Hollander KC has already in his judgment on the security for costs application, determined what the sanction can be for a failure to put up the security in question. What is particularly relied on by Mr Lakin is paragraph 53 of Mr Hollander KC's judgment where he said:

“However, there is a claim for damages by Ceto for breach of the charter. My observations do not apply to that. In the light of my conclusions on stifling, I will order security for the costs relating to that part of the claim in a sum to be determined by me. The sum will be much smaller than that claimed overall and even if I was wrong on my conclusions above on stifling, I would not expect an order in that regard to stifle the claim. I would expect the payment to be staged and the consequence if not paid is that the damages claim and not the whole claim, be stayed”.

18. The order which was made on that occasion provided in paragraph 3:

“The defendant has liberty to apply for an order that the claimant's damages claim be stayed if the payments are not made in accordance with paragraph 2 of this order”.

As I say, Mr Lakin's point is that Mr Hollander KC has decided that the only sanction which can be imposed for non-payment of the security for costs is, on application, a stay of Ceto's damages claim.

19. I do not consider that Mr Hollander KC's judgment or order was a determination that the only sanction which the court could impose for non-payment of the tranches of security was a stay. In any event, it is accepted that the court could vary that order if there was a change of circumstances and it appears to me, if that is the test, that there has been a change of circumstances, in that there has not only been a failure to pay those first two tranches but there has also been a failure to pay the anti-suit injunction costs.
20. Accordingly, were it necessary to analyse the matter in terms of a change of circumstances, I would conclude that there had been a change of circumstances. Moreover, the point is a somewhat academic one as it could not be said to be inconsistent with the terms of paragraph 3 of Mr Hollander KC's order if the court were to order that the damages claim be permanently stayed. A permanent stay of the damages claim would have the same consequences as the damages claim being struck out. In any event, the point about the terms of Mr Hollander's order does not have any bearing on the application in so far as it is advanced for a failure to comply with the Baker anti-suit injunction and Baker Part 8 costs orders. As I would be minded to impose the sanction in respect of them in any event, the point does not matter.
21. The case appears to me to be one in which it is just and convenient that a sanction is applied to ensure the payment of these various amounts in the absence of any reason to believe that they cannot be paid, and that is what I propose to order. I will not, and as I said at the outset of this judgment, make it payable within seven days. I am going to make the period significantly longer than that, but I will hear argument.

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