

IN THE HIGH COURT OF JUSTICE - QUEEN'S BENCH DIVISION

NCN: [2019] EWHC 909 (QB)

Case No: HQ17X00995/QA-2018-000006

Courtroom No. 12

The Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 13th March 2019

Before:

THE HONOURABLE MR JUSTICE DINGEMANS

B E T W E E N:

TURQUOISE INTERNATIONAL LTD

and

DEARMAN ENGINE COMPANY LTD

MR T WALKER appeared on behalf of the Claimant

MR J DALBY SC (Ireland) appeared on behalf of the Defendant

JUDGMENT

(Approved)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE DINGEMANS:

1. This is a hearing of an application for permission to appeal, and if permission to appeal is granted, the hearing of an appeal from those parts of the order of Master Kay dated 12 November 2018, which ordered: (1) the parties to give standard disclosure by list by 4.00pm on 26 November 2018; and (2) costs to be paid by the appellant of its application to vary the summary judgment. Sir Alistair MacDuff, sitting as a Judge in the High Court, granted a stay of those parts of the order and ordered this hearing by his order dated 12 February 2019.
2. The relevant background is that Turquoise International Limited (“Turquoise”), the claimant and respondent to this appeal, is a company which provides corporate financial services. Dearman Engine Company Limited (“Dearman”) is the defendant and appellant in this proposed appeal and is developing zero emission engine technology using liquid air.
3. Dearman was seeking to obtain investment. By an agreement dated 22 January 2015 (“the agreement”) Dearman retained Turquoise to provide corporate finance advisory services and to assist in raising finance. The agreement provided for Turquoise to be paid a success fee of 5% for any investment which it secured which was termed a transaction. Transaction was defined to include capital raising, acquisitions as joint ventures, recapitalisations and other transfer of assets or securities. Excluded from the definition of transactions were certain investments made by associates of existing investors.
4. During 2015, some £19.5 million of capital funding was secured, of which some £16 million was to be provided by Park Vale Capital Limited (Park Vale) for Cleantech LP, an investment vehicle related to Park Vale. Directors of Dearman were appointed by or on behalf of Park Vale. It appears that Cleantech reported material adverse changes under the terms of the investment agreement, which enabled it to stop providing investment funds. Dearman alleged that Turquoise had acted in breach of the terms of the agreement by producing an inaccurate financial plan and making misleading negligent misrepresentations to funders.

These proceedings and summary judgment.

5. Turquoise commenced proceedings, seeking information pursuant to the agreement, payment of the success fees and an account of the success fees and interest due to the claimant under the agreement. Dearman defended the claim and counterclaimed for damages for breach of the agreement. An application for summary judgment for an account was made. By a written judgment dated 8 March 2018 Master Kay QC considered the issues and found that the duties pleaded by Dearman to be owed by Turquoise were not arguable in the light of the express terms of the agreement. He found that Turquoise had done the work and was entitled to payment and he directed that an account be taken.

Further investments in Dearman.

6. It became apparent after the order for the taking of the account that other investments had been made in Dearman. I will call these “the disputed transactions”. Turquoise claim to be entitled to payment of a success fee in respect of those disputed transactions but Dearman assert that they have no liability to make any payments. It appears from the skeleton argument filed on behalf of Dearman that a substantial motivation for this appeal is that it is unfair for Dearman to be held liable to pay those fees when there is a dispute about it.

The taking of an account.

7. It is not unknown for issues to arise in the course of taking an account, which require to be determined. See CPR Practice Direction 40A at paragraph five, helpfully referred to by Mr Dalby Senior Counsel (Ireland) in his skeleton argument. It is apparent that there is an issue about Dearman’s liability for the disputed transactions and Dearman contend that these were based on existing relationships and Turquoise contend that it is covered by the terms of the agreement. What it is necessary to do is to ensure that any such issues are

determined fairly and proportionately.

The grounds of appeal.

8. In relation to the first part of the order to be appealed, namely the order for standard disclosure, Master Kay raised in the course of case management hearings and as a result of various applications that had been made to him, the proposal to make an order for standard disclosure. The first proposed ground of appeal was that the order was made of the Master's own motion. That is, as a matter of chronology, accurate but Master Kay gave a fair opportunity for the appellant to respond to his proposal and, indeed, an email was written as a response to it. In my judgment Master Kay was entitled then to make the order as a matter of case management.
9. The second proposed ground of appeal was that he was functus. Reference was made to authorities and text books, identifying the need for finality in litigation. In my judgment, this ground of appeal is to misunderstand the process of taking an account. An account is ordered if, among other matters, the party is not able to identify what is due and payable because the information is peculiarly under the control of the other side. This was not an end of the litigation. The Master had, and had to have, jurisdiction to manage the process of taking the account.
10. A third point made was that the Master did not make a more restricted order for specific disclosure which might have been restricted to the issue of liability in relation to those disputed transactions. In my judgment this was a matter of case management and there is no error in approach by the Master in ordering standard disclosure. Furthermore, in circumstances where these matters are peculiarly within the knowledge of Dearman, I well understand the approach that the Master took.
11. A further complaint is made that the Master did not consider issues of confidentiality and that there may be disclosed documents which contain, for example, loan amounts. If there is a liability to account for the loans, the amount of the loan needs to be known. The fact that the liability to account for these disputed transactions remains to be determined is not a bar to ordering disclosure at this stage. Dearman has the protection of the implied undertaking given by anyone to whom standard disclosure is given, namely that those documents are to be used only for the purposes of the litigation.
12. A complaint is made that the Master did not consider and deal with each of the points made in the email which was sent after he had raised the possibility of ordering standard disclosure but, having read carefully through that email, and having confronted some of the issues raised by that in this short judgment, there is nothing which shows that the Master should not have made the order that was made.
13. A further point was made that the Master did not have regard to 1,100 pages of evidence. Fortunately, I have not been given that many pages of evidence but I have read what I do have and, in my judgment, there was certainly no need to refer to all of the pages of the evidence because they were not material to this particular issue. Finally the complaint is made that the Master did not refer expressly to PD 40A which provides at paragraph 5 that the Court may in the taking of an account or in the course of an inquiry, direct a hearing in order to resolve an issue that has arisen. For that purpose the court may order that points of claim and points of defence be served and give directions. Master Kay did not refer to that but he dealt with it by directing that the parties should respond to various further information and that a further reply could be served. The Master had well in mind the issue of how this was to be managed.
14. In those circumstances, in my judgment, there is no justiciable basis on which I should grant permission to appeal. This was a case management decision. No point of principle arises and there was no impermissible error in the approach taken by Master Kay QC. I refuse permission to appeal.
15. In relation to the second part of the order to be appealed, namely the costs of the application to vary the order for summary judgment, that was advanced before me by reference to the

written submissions. In those submissions it was said that Master Kay should have waited to the end of the proceedings before ordering those costs to be paid, and reference was made to various proposals for resolving the matter which it is said could be fully explored at the end of the matter.

16. In my judgment, Master Kay was perfectly entitled and, indeed, right to decide that if an application was made which should not have been made then, regardless of the overall disposal of this action, the costs of that application should be paid. Such an approach discourages the taking of poor points in the course of proceedings which, however the proceedings end up, should not be overly delayed.
17. For all those reasons, I refuse permission to appeal on both proposed grounds and that deals with the appeal. I should say, however, that in preparing for this hearing I did find it very difficult to chase down what both parties say about the disputed transactions. I suggested that both parties should file a short position statement, or points of dispute and points of defence, in relation to that. I am happy to say that both parties have agreed to that and I will, therefore, direct that the parties should continue to liaise and cooperate and produce the document. It is apparent that many issues are capable of being sorted out with goodwill on both sides without compromising their respective fundamental positions on the dispute.

End of Judgment

Transcript from a recording by Ubiquis
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

This transcript has been approved by the judge.