Neutral Citation Number: [2022] EWHC 1113 (Comm)

Case No: CL-2021-000532

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 29th April 2022

Start Time: **9.30 am** Finish Time: **10.00 am**

Before:

HIS HONOUR JUDGE PELLING, QC

- -

Between:

MICHAEL WILSON & PARTNERS LTD

Applicant

- and -

EMMOTT & ORS

Respondents

- -

- -

MR MICHAEL WILSON for the **Applicant**
MR RAJIV BHATT for the **Second** to **Fourth Respondents**
MR CHARLES DOUGHERTY, QC for the **Fifth** and **Sixth Respondents**

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APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE PELLING, QC :

1. This is an application by Michael Wilson & Partners Ltd contained in an application notice dated 13 April 2022 by which he seeks an order adjourning and re-listing a hearing which is currently listed to take place over four days on 9 to 12 May with 9 May being a reading day.

2. The underlying dispute is one I can summarise relatively shortly. There have been multiple proceedings between Michael Wilson & Partners (the claimant in the current proceedings) and Mr Emmott. In those proceedings, various costs orders have been made, as one might expect, with some costs orders being made against Michael Wilson & Partners. In these proceedings, Mr Wilson alleges that the costs orders, the subject of this litigation, were obtained in effect by fraud because he maintains that the arrangements that Mr Emmott had entered into with a Mr Sinclair, and/or various entities controlled by Mr Sinclair, involved the only obligation to pay solicitors' and counsel's fees being a direct obligation between either Mr Sinclair and/or Mr Sinclair's controlled entities and either counsel and/or solicitors. In consequence, he maintains, the indemnity principle was never engaged. That was never disclosed to the court which he maintains is fraudulent and, therefore, he says is entitled to recover all the sums which have been paid over the years as payments on account of costs and he is entitled to the annulment of the various costs orders that have been made.

3. That then is, in substance, what this dispute is about. There are further details which I could go into but do not intend to on this short application.

4. The defendants, other than Mr Emmott I think, have issued applications to strike out the claim on the usual grounds identified in the Civil Procedure Rules. Evidence has been filed in support of that application and a lengthy witness statement in answer was filed by Mr Wilson. Evidence in reply was filed on or about 1 April on behalf of at least the second, third and fourth defendants and also the fifth and sixth defendants.

5. The evidence rounds are complete. There is a direction in place that no other evidence is to be filed other than with leave.

6. The present application was issued, as I have said, on 13 April and seeks an order vacating the hearing which has been fixed to take place commencing on 10 May 2022 on two bases: first it is alleged that Mr Wilson, who represents as the legal representative solicitor for MWP, is unfit through medical circumstances to attend any hearing whether it be remote or attended in London. Secondly, he seeks an order that the hearing be vacated because, he maintains, he ought to be given permission to file additional evidence in reply to the reply evidence that has been filed and ought to be granted that on the basis, as he now puts it, that the evidence filed in reply is not reply evidence at all but is further evidence in support of the application which could and should have been set out in the evidence in support of the application filed at the time as the original application notice seeking strike-out of the claim.

7. The application is opposed by the second to sixth defendants on two bases: firstly, it is said that the application for an order vacating the hearing on medical grounds fails to comply with even the basic principles of procedural fairness and the evidence which is filed in support of the application does not comply with what the case law in this area has required for many years.

8. Secondly, and in relation to the evidence in reply, it is submitted that the evidence in reply is true reply evidence and because it is true reply evidence, no further evidence is merited in relation to it because there must be an end to proceedings. But, secondly and in any event, if at the substantive hearing I came to the conclusion that the evidence that was being relied upon strayed outside that which was permissible, then it was open to me simply to refuse to admit that evidence or to have regard to those parts of the evidence which went outside true reply evidence.

9. To that I would add that which appears to have been overlooked in this application, which is that because this is an application by the defendants to strike out the claim, there is a relatively high threshold which must be overcome if a strike-out order is to be sought. If the issue is one which requires evidence or might require evidence in reply to the reply, then that suggests that the relevant threshold could not be overcome.

10. Turning then to the present application, the evidence which is filed in support of it is that contained in paragraph 10 of the application notice and is in these terms:

> "While MWP has no interest in any delay given the circa £8 million cost fraud to which it has been wrongly made subject since 2006 to date, especially given the burden of proof was found to be passed on 30 November 2020 and which MWP has sought to be dealt with for some considerable time … unfortunately, the hearing will need to be adjourned and re-listed for a date after the end of June because, without waiving privilege and confidentiality, Mr Wilson has been advised that he will not be able to resume attending the office, normal work or life until then …"

11. That is the sole evidence which has been filed in support of the application for an adjournment on medical grounds. The evidence in support of the application then continues in this form:

> "In addition and, as a separate matter, MWP has only recently received substantial further evidence from all of the second to fourth (39 pages), fifth (21 pages) and sixth (56 pages) defendants which goes far beyond evidence in answer including by trying to introduce new evidence from the first defendant taken from other claims and folios, to which the second to seventh defendants are not party, and its reply evidence of 13 February 2022 as to which MWP needs further time to reply, including in light of the matters referred to above …"

12. In addition, Mr Wilson complains in the evidence in support of the application what he maintains to be procedurally unfair treatment in that the listing officials of this court apparently required him to issue a formal application if he was seeking to adjourn the hearing, whereas on previous occasions in these proceedings, when adjournments have taken place, that has been dealt with informally.

13. So far as the last of these points is concerned, that is not something which I can become involved in on a hearing of an application of this sort, not least because it is entirely

immaterial to the substantive outcome of the application. In those circumstances, I propose to say no more about it.

14. I turn, therefore, first to the application to adjourn on medical grounds. The relevant principles are those which were identified by Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) at paragraph 36 where, in relation to an application by a litigant in person for an adjournment on medical grounds, he said this:

> "… in my judgment, it falls far short of the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial. Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence; even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case). The letter on which the appellant relies is wholly inadequate."

15. To that I should add the point made by Warby J, as he then was, in *Decker v Hopcraft* [2015] EWHC 1170 (QB) where, at paragraph 28, he said this:

> "The question of whether effective participation is possible depends not only on the medical condition of the applicant for an adjournment but also, and perhaps critically, on the nature of the hearing, the nature of the issues before the court and what role the party concerned is called on to undertake. If the issues are straightforward and their merits have already been debated in correspondence, or on previous occasions, or both there may be little more that can usefully be said. If the issues are more complex but the party concerned is capable, financially or otherwise, of instructing legal representatives in his or her place and of giving them adequate instructions, their own ill health may be of little or no consequence. All depends on the circumstances as assessed by the court on the evidence put before it."

16. Turning to the circumstances of this application, unlike the situation faced by Norris J in *Levy v Ellis-Carr*, **ibid**, this is not a trial but is an interlocutory application by the defendant seeking to strike out the claim form and particulars of claim on the basis it discloses no realistic course of action. In those circumstances, Mr Wilson will not be required to give oral evidence and all the evidence is contained in the written statements

which have been filed in support, answer and reply in the application to date. Furthermore, Mr Wilson acknowledged in the course of his submissions that counsel is retained in relation to the application. Thus, as it seems to me, simply looking for the moment at the circumstances other than the medical condition of the applicant referred to by Warby J in paragraph 28 of his judgment in *Decker*, **ibid**, this is one of those cases where the attendance of Mr Wilson is not of central importance but, more to the point, in my judgment, can be catered for in other ways.

17. The primary point which is made by Mr Dougherty, QC on behalf of the second to fourth defendants is that there is no medical evidence filed in support of this application which, he submits, is inevitably fatal to the application to adjourn on medical grounds. He is correct in those submissions. It would be fair to say, however, that Mr Wilson sent to the court a letter dated 3 April 2022 from Dr Hamid who is a consultant orthopaedic surgeon. He practises at a hospital in Dubai where, as I understand it, Mr Wilson underwent orthopaedic surgery at the end of last year or the beginning of this. I should say that Mr Wilson, in his capacity as a principal of Michael Wilson & Partners Ltd, practises from Almaty in Kazakhstan. The letter, which was signed by Dr Hamid, referred to an earlier letter of 14 February 2022 which has not been included in the bundle or attached to the letter of 3 April, says he is writing to provide a short update. What he then says is as follows:

> "Further tests and checks were carried out on 25 March 2022 in subsequent consultations and discussions from which it transpires that, whilst recovery is underway, Mr Wilson will not be able to resume attending the office, normal work and life for approximately at least a further two months, namely through until late June 2022. As we previously noted, given the nature of your condition, the operation, treatment required and steps to achieve full recovery and recuperation, of course, the actual timeline will depend on the pace of recovery achieved which can never be certain in medical matters …"

18. As Mr Dougherty submits, and I accept, this letter first of all is not properly to be regarded as evidence at all, since not merely is it not exhibited to the application notice or to a witness statement in support of the application, but more pertinently was sent only to the court and not to the other defendants. Mr Wilson is an extremely experienced and capable solicitor and knows full well that if material is to be relied upon in support of an application, then at the very least it has to be served on all parties to the relevant application. That is sufficient of itself to dispose of the reliance placed on this letter. However, matters go further than that because the contents of the letter have to be compared and contrasted with what Norris J said in *Levy v Ellis-Carr*, **ibid**.

19. In particular, the following questions naturally arise on the face of Dr Hamid's letter: (1) What the nature of the surgery was initially. (2) Why it is Mr Wilson is unable either to fly to London or attend remotely a hearing in London. (3) It begs the question what additional tests and checks were carried out on 25 March and what conclusions are to be derived from the results of those tests.

20. Next, it begs the question as to what further information emerged from the consultations and discussions which are referred to in the letter. Finally, and in relation to Mr Wilson's submission that he is physically unable to sit at a desk for longer than an

hour at a time, it begs the question what part of Mr Wilson's medical condition leads to that consequence when that is not referred to at all, even in the letter from Dr Hamid.

21. Finally, and in any event, this hearing is due to take place at an attended hearing in court in London. There is no reason why, if Mr Wilson is unable physically to fly to London, that he could not be joined into the proceedings by way of a Teams link, as has happened very frequently in relation to hybrid hearings during the latter part of the pandemic crisis. If and to the extent Mr Wilson is unable to sit at a desk, he may be able to sit in more comfortable circumstances and follow the hearing in the link that I have described.

22. More to the point, if and to the extent it is necessary to do so, then breaks can be provided in order to facilitate him breaking from sitting at a desk or otherwise while watching the video link. If and to the extent it is necessary for him to provide instructions to counsel which are necessary for the proper conduct of the hearing, then again there is no difficulty whatsoever in my providing for appropriate breaks for that to happen. Indeed, that happens even when fully-attended hearings take place and instructions need to be taken which require a few minutes of time between counsel and solicitors.

23. Regrettably, from first to last, this is an application to adjourn on medical grounds which was doomed to failure. It is unsupported by evidence; it fails to address particularly the circumstances which preclude or are said to preclude Mr Wilson attending or instructing counsel. In those circumstances and for those reasons, the application to adjourn on medical grounds is dismissed.

24. So far as the position in relation to further evidence is concerned, I can deal with that rather more shortly. Although Mr Wilson refers in the application notice to a large number of pages in the reply evidence, two points need to be made.

25. First of all, the reply evidence was served on 1 April, now getting on for a month ago. Secondly, the evidence that has been served consists of relatively short statements running to the order of five or slightly more than five pages but then with exhibits.

26. The only point of substance that Mr Wilson has made in relation to that evidence is that one of the exhibits consists of a statement or statements that Mr Emmott has given in earlier proceedings and that is likely to be materially misleading unless answered or, at any rate, the evidence in answer to Mr Emmott's statements are produced as well.

27. I am bound to say I have some sympathy with that point but it is not a point which requires this hearing to be adjourned; it will merely require counsel for the defendants, in seeking to rely upon that material, to justify relying upon it. Now is not the time to determine such an application but I am bound to say I will require some persuasion that it is appropriate to incorporate by reference into reply evidence lengthy witness statements filed in earlier proceedings unless for very limited and identified purposes.

28. As Mr Dougherty has submitted, and I accept, ultimately the control over the evidence which is relied upon in the strike-out application will be for me at the hearing. So far as that is concerned, in common with all judges hearing interlocutory applications, I will be keen to ensure that the evidence is strictly confined to that which is evidence in reply and will not permit evidence to be run for the first time in reply evidence unless

it is genuinely and succinctly true reply evidence to points made in Mr Wilson's evidence in answer to the application.

29. The real difficulty about all of this is that any interlocutory application requires to be brought to an end since otherwise there will be no end to the evidence that is filed in support and answer to it. The Commercial Court Guide makes it abundantly clear that in heavy applications of this sort, the sequence will be evidence in support, followed by evidence in answer, normally to be filed within 28 days with evidence in reply to be filed 14 days later. The Commercial Court Guide does not contemplate the filing of further evidence and the order in this case makes it perfectly clear it will not be permitted unless good reasons are shown. There are no good reasons demonstrated at any rate on the evidence in support of the application and, as I have said, the use that can be put to evidence which goes beyond a true reply will be limited by judicial control at the hearing.

30. This is an application which has been outstanding for some time. The claim makes very serious allegations against solicitors and leading counsel. I do not know, because I have not read the material, whether the application to strike out the claim stands any realistic prospect of success or not. However, I am clear that where serious allegations of professional impropriety are made against professional people, it is incumbent on the court to enable those issues to be resolved as quickly as possible. If and to the extent the claims that have been made are capable of being struck out, then that application should be determined in early course.

31. By the same token, if they are not capable of being struck out and are required to go to trial, then it is incumbent on the court to facilitate both the speedy disposal of any interlocutory application to strike out and the speedy resolution of the issues at a trial.

32. In those circumstances and for those short reasons, the application is refused and the hearing will proceed in May as directed.

33. As to permission to appeal, the test I have to apply in considering an application for permission to appeal is whether there is a realistic prospect of success or some other reason why permission should be granted. Mr Wilson submits that I should grant permission to appeal because there is a realistic prospect that the Court of Appeal would come to a different conclusion in relation to the application to adjourn on medical grounds. He says that I should take that view because my own decision differs from a decision made by the High Court of Australia and, secondly, by an Insolvency judge in relation to some insolvency proceedings.

34. To be clear: (1) The application that I have to determine is one which must be determined on the evidence that is before me and is not influenced by what other judges in other jurisdictions have done, particularly when the evidence before those judges and the circumstances in which the applications were made are not before me. (2) This is a case management decision and, therefore, by definition is a challenge to a decision on discretionary grounds. The Court of Appeal will not interfere with case management decisions by first instance judges other than circumstances where the court is persuaded that the judge has reached a decision that no reasonable judge in the circumstances could reach.

35. There is no realistic prospect of the Court of Appeal reaching that conclusion in relation to my decision not to permit the hearing to be adjourned on medical grounds on the basis that it was presented. In those circumstances, permission to appeal is refused.

This Judgment has been approved by HHJ Pelling QC.