NCN: [2023] EWHC 1238 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Case No. LM-2022-000220

7 Rolls Buildings
Fetter Lane
London

BEFORE: The Honourable Mrs Justice Dias DBE

DATED: 4 May 2023

IN THE MATTER OF

FIBULA AIR TRAVEL SRL

(Claimant)

- v -

JUST-US AIR SRL

(Defendant)

MR MATTHEW BRADLEY KC, instructed by Hudson Morgan Williams Ltd, appeared on behalf of the Claimant
MS EMILIE GONIN, instructed by Consortium Legal, appeared on behalf of the Defendant

APPROVED JUDGMENTS
4th MAY 2023

Transcribed from the official recording by eScribers
Central Court, 25 Southampton Buildings, London WC2A 1AL
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MRS JUSTICE DIAS DBE:

1. The only question that I really have to determine here is who was, overall, the successful party and it seems to me there can be no doubt that Fibula was the successful party. With all respect to Ms Gonin's persuasive submissions, we do not operate on the basis of some latter-day law of citations. The number of defences that are raised is really of peripheral relevance. The fact of the matter is that the claimant sought to amend its pleadings on four grounds; the defendant opposed that application root and branch (with the exception of some minor clarifications to which they agreed) but have failed to shut out the amendments.

2. The plaintiff has been permitted to raise two substantial defences and, in those circumstances, they are the overall successful party. That said, I recognise that (i) they are in this position largely because of a situation that they have brought on themselves and (ii) they were only partly successful. For those reasons, it is my view that there should be a discount on the costs that they recover. My order on the point of principle is that they therefore recover 65 per cent of their costs of the application.

(Proceedings continued – please see separate transcript)

MRS JUSTICE DIAS:

3. I have now to carry out a summary assessment of the claimant's two costs schedules. By way of overarching point, Ms Gonin says that the hourly rate claimed is excessive by reference to the guidelines. I tend to agree. It does not seem to me that this was a particularly substantial or complex matter in terms of the application that was made. I see no good reason, in those circumstances, to allow more than the guideline rate of £282.

4. The work done on documents also appears excessive looking at the nature of the application and the evidence that was filed. In particular, it seems to me that the amounts claimed in relation to the third witness statement of Mr Armutlu is excessive and that no more than 20 hours should have been allowed in total for items 2 and 4. The time allowed for reviewing the letter of 10 November is excessive as also is the amount of time claimed for perusing and in relation to the application for extension of time and reviewing the defendant's reply statement on the substantive application and exhibits.

5. In all, it seems to me, applying the reduced hourly rate and applying the hours that I think are reasonable and proportionate for the work claimed, the work done on documents by my calculation comes down to £13,295. I see no reason to take any issue with the amount claimed for counsel. That brings the total of the schedule for 24 March down to £47,795 which I would propose to round up to £50,000.

6. There then remains the amount of costs claimed for today. In my view, £11,000 for a one hour consequentials hearing is excessive. I propose to allow £7,500 for that, which brings the grand total on a hundred per cent basis down to £57,500. I do not have a calculator with me but I am sure somebody can do the maths for 65 per cent of that.

MR BRADLEY: That is £37,375.

MRS JUSTICE DIAS: £37,375.

MR BRADLEY: Yes.

MRS JUSTICE DIAS: I am grateful.

(Proceedings continued – please see separate transcript)

MRS JUSTICE DIAS:

7. Permission to appeal is refused. In my view, an appealwould have no reasonable prospect of success. Surprising as it may seem, I continue to believe that I was right in saying that the decision on the audit and approvals defences were not fundamental to the decision of his Honour Judge Pelling. Issue estoppel requires the court to look at the decision which the lower court made and the basis on which they made it. The question of whether the audit was passed was not fundamental to his Honour Judge Pelling's decision on the only basis on which he was considering the matter.

8. Nor does the fact that Fibula subsequently sought permission to appeal to the Court of Appeal logically mean that it was a necessary step in the lower court's reasoning. In fact, Males LJ when refusing leave on ground 4 because the point was not pleaded, confirmed that the judge is only required to decide the case that is actually put and argued before him. Allowing the amendment does not therefore necessarily lead to the consequence that his Honour Judge Pelling's judgment was wrong or that his judgment cannot stand. The claim before him was a claim for the return of the deposit.

9. The counter-claim which is now in issue is a wholly separate claim. The audit defence does not arise for decision, not least because, as the judge explained, it had not been pleaded and there was no application to amend. He expressly made clear that in those circumstances the point was not open to the claimants to take and went on to say that he was therefore proceeding on the basis that it was not an arguable point to be taken. I can see that there is some tension between him saying that the point was not open to the claimants but then purporting to accept on the evidence that the audit was passed, but in my judgment, on a fair reading of his judgment as a whole, he was simply making an assumption as to a fact which was not, in fact, in issue.

10. The corollary of this is that the point was not argued and no decision on it was required. Since the point was not raised and not decided, it cannot therefore give rise to an issue estoppel. But, even if I were wrong about that, the fact that the issue was not fundamental to his judgment is in my view fatal to any argument of issue estoppel.

11. In relation to *Henderson v Henderson*, it seems to me that I have said all that needs to be said in paragraph 31 of my judgment, namely that it is not abusive in all the circumstances for Fibula to seek to defend itself. In arriving at that decision, I took careful account of the balance of prejudice, including potential injustice to the defendant which I found was clearly outweighed in the circumstances by the potential injustice of the plaintiff.

12. I also took account, necessarily, of the public policy in favour of finality which is, after all, inherent in and underpins the entire doctrine of issue estoppel and *Henderson v Henderson*. It is, therefore, automatically taken into account and hardly needs separate consideration.

13. Likewise with the approvals defence, which was not raised at all even informally and, as such, cannot have been fundamental to the decision which was actually made. Again, it seems to me that, in those circumstances, there can be no issue estoppel on this particular point.

14. For those reasons, permission to appeal is refused.
