

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
NEWCASTLE CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Thursday, 30 November 2023

BEFORE:

MR JUSTICE ANDREW BAKER

BETWEEN:

CANON MEDICAL SYSTEMS LIMITED

Claimant

- and -

**(1) THE IMAGING CENTRE ASSETS
LIMITED**

**(3) THE IMAGING CENTRE MOBILE
LIMITED**

(4) TIC MOBILE LIMITED

Defendants

MR GOLDBERG, KC and **MR STUBBS** (instructed by Knights Professional Services Limited) appeared on behalf of the Claimant

MR PENNY, KC and **MR HOLMES** (instructed by Fox Williams LLP) appeared on behalf of the Defendants

JUDGMENT
(Approved Transcript)

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Mr Justice Andrew Baker:

1. Although I floated an alternative, Mr Goldberg KC's clients will have heard that it operates at the level of no more than (to the extent, if at all, that this is something I should be doing) informal judicial encouragement that if the Project is to get back on track in accordance with how my judgment has held it should have been operating, there may be room for them to take the view that, at least if we are talking about Units, which by definition means Canon-equipped transportable units, perhaps Canon's obligations to do all they reasonably can to establish the Product in the marketplace might favour the notion that if they do not have availability in the First Fleet, they should at least give consideration to seeing whether there is availability of a Canon-equipped unit in the Second Fleet. I say nothing at all about whether they should be encouraged to think about trying to rent out a Philips-equipped Second Fleet unit rather than sourcing from somewhere else a Canon-equipped unit, if there is not one available from the First Fleet.
2. With that limited, informal judicial encouragement only given, my overall view is that what Mr Penny KC is seeking to do – in the very attractive way in which he presents all of his submissions – is reinvent in effect the claim that failed at trial to the effect that the competitive behaviour, to the extent it has been proved, has had some relevant consequence on the First Fleet, as I have defined it, for the purposes of the Master Agreement. The reality of my conclusions across the board, both as to liability and also very much as to causation and Mr Kleanthous's own evidence as to what he was attempting to achieve, is that, in truth, if there are in the short or medium term availability difficulties because the First Fleet is only a certain size, that is because Mr Kleanthous has freely chosen to keep it that size, something he was not forced to do. My judgment, even with its finding that there was anti-competitive behaviour by the degree to which the First Fleet has been, as it were, two units shorter, two units lighter, than it should have been, which is the specific breach of the unit sale obligation, was that that did not give rise to identifiable or quantifiable business impact, so it resulted in nominal damages only.
3. For those reasons, I am against the idea that there should be a further proviso as proposed by Mr Penny KC in relation to the injunctive relief.

4. I have also made the observations I have made in the course of discussing the point as to it being not clear to the court that that element of handcuffing Canon beyond the strict limits of the contractual obligations is necessarily between now and the end of May next year going to be advantageous to TIC and the First Fleet anyway, depending always how it is that Canon goes about marketing what it is doing and communicating with customers, if and when it is facing demand which it cannot immediately satisfy from the First Fleet, when that is all something that is getting into the minutiae of the collaborative operation of the Master Agreement that I am not in a position today to start trying to legislate for by way of wording of an injunction.
 5. So, I am against the qualifier to or proviso within the proviso. The proviso will simply be in terms of nothing in the injunction preventing action otherwise restrained where there is no First Fleet availability.
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Later:

6. In my view, for the reasons I have already indicated in giving a partial ruling so as to focus Mr Penny's brief reply submissions on the only point I needed him to respond to in relation to what Mr Goldberg had said, the right order at a first level of generality is to reflect the first and third defendants' general success in the claims and counterclaims other than the unit sale claim, on the one hand, and the claimant's general success in the unit sale claim, on the other hand. I am not persuaded that in terms of quality, or likely impact that I can assess on the financial impact of the result, the room there may be for seeking to reflect in the costs order on the unit sale claim the degree to which aspects of that claim on which the first and third defendants succeeded contributed to or aggravated the costs will not in overall justice broadly balance with the degree to which one might perhaps be able to justify a degree of deduction from the first and third defendants' recoverable costs in relation to those elements of the claims and counterclaims more generally where they did not succeed or they did not succeed in full. I am certainly not persuaded that in the latter regard, although Mr Goldberg is fair and correct in being able to point to a number of different individual aspects of the case where TIC was not wholly successful, that they, individually or collectively, will have been responsible for any very significant aggravation of the costs.

7. I take the view that it would have the capacity to work an unfairness, and to have an appearance of unfairness, to attempt more finely to slice the costs order of the unit sale claim, by reference to a notion of the first and third defendants having enjoyed a measure of success along the way, and not to attempt the same exercise in relation to the costs of the claims and counterclaims more generally.
8. The fair and just order as to costs overall, in my view, is in fact therefore to give effect more simply to that first order of generality of result, and that is to say that the claimant will pay the first and third defendants' costs of the claim and/or counterclaims except for their costs of and occasioned by the unit sale claim as referred to in the judgment, and the first and third defendants meanwhile will be ordered to pay the claimant's costs of and occasioned by the unit sale claim, those two costs liabilities to be set off against each other and to be subject to detailed assessment if not agreed.

[*Counsel indicated to the court that applications on each side for any detailed assessment to be on the indemnity basis were not pressed.*]

9. For what it is worth, and if it gives reassurance through counsel and the solicitors to the clients listening in, I certainly was likely to take the view that the nature of the points being made on each side in relation to that were not dissimilar, so I suspect it would again have been sauce for the goose and sauce for the gander if there had been a powerful enough argument for indemnity costs. It perhaps would have been in both directions, and it therefore probably is the case that overall simply saying, given the balance of the costs order that has been made anyway, that assessing both on the standard basis feels the right result.
10. Having had the privilege of trying this case for the parties, I can now see that this was a case of importance to the clients, and of a factual complexity and an asserted (and indeed it may yet be an actual) financial value to the parties, quite different to that which will have appeared to be the case to the court at a stage of costs budgeting. To the extent, therefore, that as trial judge I am able to make any such observation, I would encourage any costs judge seized of this for a detailed assessment to err towards the view that it is likely to have been reasonable and proportionate not to stay within the budgeted levels of costs, whatever they were, on both sides, and in respect to the litigation generally.

Later:

11. I am against the application for permission to appeal, not because having been the trial judge and having decided the point I am not capable of identifying, if it be the case, that there is a real prospect of success in an argument that I have erred, but because the high water mark of the argument on its substance, as it seems to me, is the possible suggestion that because the challenge to the validity of the setting off of warranty / servicing charges calculated by Canon, all as squarely pleaded in the defence, was not expressly carried through in the way in which the claims to relief in the counterclaim were articulated, the court was not entitled to respond to the case as prepared for and presented to it at trial and award in favour of TIC a correctly-calculated amount derived from a conclusion at trial that the set-off indeed had not been established as justified.
12. The principal factual work required in order for the court to be able to deal with that possible claim to relief was all appreciated in my view on both sides as having been done, with the benefit of the accountants' expert input, for the purpose of establishing at trial whether, if the rental income obligation was 100%, as claimed by TIC, it had or had not been paid in full, bearing in mind that on the one hand, notwithstanding Canon's position that it did not have the obligation to pay over rental in full, it had purported to account in full for rental, but on the other hand it had not paid cash in full in respect of that rental amount as thus accounted for, because of the claim to set off warranty / servicing charges that was challenged.
13. Furthermore, as a matter of formality, I had no doubt that even if there be some merit in the failure to carry that through explicitly into the way in which a plea for monetary relief was articulated as a debt claim on the face of the pleadings as they stood, Canon was well aware that if the court had been persuaded to order the sort of account which it sought of the dealings between the party, the outcome of this trial would have been one in which any underpayment to TIC, if proved, in respect of rental income by reference to invalid purported set-offs would have been brought into the account. There is no prejudice or injustice whatever, as it seems to me, in the court, having in those circumstances regarded it as open, fairly, under the process that the parties had followed and the trial which the parties had had, to grant monetary relief as it has now

granted, even if there be an argument that a claim for relief precisely of that kind was not as well articulated in the pleadings as it might have been.

14. For those reasons I would reject the application for permission to appeal in any event. I am reinforced in those views by having reminded myself of the dialogue with Mr Goldberg in his closing submissions in which there was an acceptance on his part, in my judgment fairly and reasonably, that in and about a slightly complex plea that had undergone a significant number of amendments within the counterclaim, not just within the defence, there was language that was capable of being understood as stating TIC's desire to claim from Canon in the proceedings any amount by which it had been underpaid by reason of the setting off of warranty / servicing charges if that had not been contractually proper.
15. So for those reasons I regard this as a case in which there would be no real prospect of success on an appeal, and I am against the application for permission accordingly.
- 16.

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