IN THE HIGH COURT OF JUSTICE HT-2020-000083
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2020] EWHC 3069 (TCC)

The Rolls Building
7 Rolls Building
Fetter Lane
Holborn
London, EC4A 1NL

Wednesday, 28 October 2020

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

KEW HOLDINGS LTD — Claimant

- and -

DONALD INSALL ASSOCIATES LTD — Defendant

MR H. SMITH (instructed by Cardium Law Limited) appeared on behalf of the Claimant.

MR P. COWAN (instructed by Kennedys Law LLP) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE O'FARRELL:

1 This is the defendant's application for an order that unless the claimant pays within seven days the sum of £600,000 as security for the defendant's costs in these proceedings, the claimant's claim be struck out, and judgment entered for the defendant without further notice.

2 The factual background to this matter has been set out in some length in my earlier judgments, namely the first judgment on 5 February 2019; the second on 15 July 2020; and I do not repeat those matters here.

3 One of the key principles of statutory construction adjudication is that of "pay now, argue later". That principle has not been adhered to by the claimant. On 21 November 2018, nearly two years ago, the defendant obtained an adjudication award against the claimant. That award has still not been paid, in part or at all, by the claimant.

4 On 5 February 2019 this court granted summary judgment against the claimant in the sum of £208,287.84, together with interest, adjudication fees and costs. That judgment debt has still not been paid, in part or at all, by the claimant.

5 On 20 July 2020 this court ordered a stay of the current proceedings pending payment of the outstanding judgment debt; secondly an order that the claimant should pay into court within fourteen days the sum of £600,000 as security for the defendant's costs, which sum should have been paid by 3 August; and thirdly ordered the claimant to pay the defendant's costs, summarily assessed in the sum of £45,000.

6 On 1 August of this year the claimant's solicitors wrote to the defendant's solicitors, informing them that the funds would be made available either on that day or imminently, but the funds were not in fact made available, and they have still not been paid by the claimant, in part or at all.

7 Therefore, as of today's date, 28 October 2020, the original judgment debt in respect of the adjudication award is still outstanding; the security that the court ordered the claimant to pay into court is still outstanding; and the costs order in favour of the defendant has still not been satisfied.

8 The claimant is in breach of a number of court orders. No application has been made to the court to vary the terms of the orders or to seek relief from sanctions or to ask the court's indulgence for further time to pay or to pay by way of tranche payments.

9 The court's power to make the order that is sought by the defendant today derives from CPR 3.1. CPR 3.1(3) provides that when the court makes an order, it may make it subject to conditions, including a condition to pay a sum of money into court, and specify the consequence of failure to comply with the order or condition.

10 At CPR 3.1.14, under the subheading, "Making orders subject to conditions", the notes in the White Book provide that in order to encourage a party to carry out their duty to help the court to further the overriding objective, an order may be made subject to conditions, and may specify the consequence of failure to comply with an order or a condition. The court is not required to impose an express sanction for failing to comply with an order or condition. Even if no express sanction is stated, the court may later strike out all or part of a statement of case of a party who fails to comply with the order. Any conditions imposed should be

expressed clearly and precisely. The condition must be one which is capable of being complied with. An impecunious party should not be ordered to pay a sum of money which they are unlikely to be able to raise. The principles to be applied were considered and restated by the Supreme Court in *Goldtrail Travel v Aydin* [2017] UKSC 57. Those guidelines include:

1. The court should not impose a condition upon a party which has the effect of stifling the party's continued participation in the proceedings. The burden of proof as to the stifling effect of a condition falls upon the party alleging it.

2. In order to prove the stifling effect of a financial condition, a party must establish on the balance of probabilities that he does not have the means to comply with the condition, and cannot raise the necessary sums, from friends, relatives or business associates willing to help him in his hour of need.

3. When a company and its owner or majority shareholder refute a submission that funds would be made available, the court should not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company's financial position, and by reference to all aspects of its relationship with its owner or majority shareholder, including the extent to which he was directing its affairs, and had supported it in financial terms.

4. In the case of a corporate party, the shareholder's distinct legal personality, which is always to be respected, save where he has sought to abuse the distinction, must remain in the forefront of analysis. The question should never be, "Can the

shareholder raise the money?"; the question should always be, "Can the company raise the money?"

5. If it is established that the owner or majority shareholder of a party will not advance the necessary funds, it is wrong to consider whether that person nevertheless has the means to do so. On this point the Supreme Court unanimously disapproved certain statements made in earlier Court of Appeal cases to the effect that in exceptional cases it was appropriate to consider whether a shareholder could advance the necessary funds even though it had been proved that he would not do so.

11 Both parties have drawn the court's attention to the guidance set out in the case of *Radu v Houston* [2006] EWCA Civ 1575, per Waller LJ, where he stated an order for security is intended to give a claimant a choice as to whether they put up security and continue with their action, or withdraw the claim. That choice is meant to be a proper choice. An order to raise a large sum of money should not be made subject to the unless sanction until the claimant has been given a real opportunity to find the money (per [18]).

12 In this case Mr Smith, counsel for the claimant, has drawn attention to the claimant's explanation for its non-compliance to date. Mr Brothers has produced a witness statement in which he explains that the claimant has been actively seeking the funding in order to comply with the outstanding judgment debt and court orders. That has included attempts to obtain loans either directly or by way of a mortgage over property in Hong Kong owned by Mr Brothers through a separate third party company; alternatively, by way of an ATE policy and bond. Mr Brothers explains that for one reason or another those efforts have either fallen on fallow ground or are yet to be realised. In addition, he states that he has

encountered additional difficulties in terms of raising money on his Hong Kong property as a result of the COVID 19 crisis.

13 As against that, Mr Cowan, counsel acting for the defendant, has drawn to the court's attention the fact that in June 2020 Mr Brothers produced a witness statement in which he indicated that he was a man of great wealth in the context of offering a personal guarantee by way of security against the costs of these proceedings. He produced a short schedule identifying the source of his wealth, which was then estimated to be in the region of about £12 million. In those circumstances Mr Cowan submits that there is no reason why the claimant, through its sole shareholder Mr Brothers, could not have provided either some or all of the security that has been ordered by the court. Further, Mr Cowan submits that the COVID 19 difficulties do not explain the failure on the part of the claimant to pay the outstanding judgment debt, or to make some payment in respect of the outstanding orders for security and / or costs.

14 Taking into account the evidence that is before the court, I accept that some efforts have been made to raise the money in order to comply with the court orders, but in general terms it is simply too little too late. The breaches on the part of the claimant are very significant. The judgment debt is over eighteen months' old, and there appears to have been no attempt to satisfy it. The failure to comply with the orders for security and costs are now some months in default, and the explanation offered by Mr Brothers, particularly when looked at against his evidence before the court at the hearing in June, does not explain the failure to comply in any small part with the court's orders.

15 I turn to the proposal that is before the court this morning, made by Mr Smith on behalf of the claimant. The new offer is that a second charge could be given over the property the

subject of these proceedings, pending the provision of a cash deposit through the loan or the ATE policy that it is anticipated will be in place by the end of November.

16 I reject that as a reasonable alternative to the current orders for security primarily for the reasons that I gave in my earlier judgment on 15 July 2020. It is submitted by Mr Smith that the difficulties in this case would be short lived because the point of the second charge would simply be to provide some security for the defendant until the cash deposit could be provided. But the fact is that it does not offer a realistic guarantee to the defendant. Firstly, in terms of enforcing that second charge, I note that the defendant has been seeking to enforce a charge over the property, and has an outstanding application seeking a sale of the property in order to enforce the original judgment debt. That has certainly not been swift. Secondly, even if a sale of the property is ordered, it is a unique property, and the estimate that had been given when the matter was last before the court was that it might take some twelve to eighteen months to sell the property. Therefore in reality the offer of a second charge does not provide the defendant with any real security in terms of a realistic alternative to a payment into court.

17 It is also submitted by Mr Smith that the current stay of proceedings provides adequate protection for the defendant. But I accept the response by Mr Cowan that the stay is not sufficient protection because the claims for professional negligence are still hanging over the defendant's head. That must be right, particularly in a case like this where the defendant has to retain legal representatives in the event that they are called upon at some point to reinstate the defence and continue with the proceedings.

18 For those reasons I am satisfied that in all the circumstances it would be appropriate to make an unless order today in relation to the claimant's failure to provide adequate security for the

defendant's costs in these proceedings. This is not a case where the claimant has not yet been afforded a real opportunity to find the funds. The claimant has been afforded years, in the case of the judgment debt, and months in terms of the current outstanding order for security. I am satisfied that it would be appropriate in those circumstances to make an unless order.

19 I note that the defendant had offered, by its solicitors, to accept an unless order in terms that the claim would be struck out if the £600,000 by way of security was not made by 30 November 2020. Mr Cowan this morning repeated that as a potential way forward. I agree that that is an appropriate date for the unless order. There is evidence before the court through Mr Brothers's witness statement that it is anticipated that either a cash loan or the ATE policy and bond will be in place, if they are going to be provided, by the end of November 2020.

20 Therefore, the order that the court will make is that:

> "Unless the claimant pays into court by 4 pm on 30 November 2020 the sum of £600,000 as security for the defendant's costs in these proceedings, the claimant's claim be struck out, and judgment entered for the defendant without further notice."

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21 The defendant is clearly entitled to its costs of the application. The claimant could have avoided this hearing by accepting the defendant's offer to give until 30 November 2020 for compliance. In those circumstances, I consider that it would be appropriate to order costs to be paid on the indemnity basis. In any event, having looked at the defendant's costs

schedule, I am satisfied that the costs are in fact both reasonable and proportionate. In those circumstances I summarily assess the defendant's costs in the sum of £11,469.15.

MR SMITH: Thank you, my Lady.

MRS JUSTICE O'FARRELL: (After a pause) You are muted.

MR COWAN: Forgive me, my Lady, thank you. Your Ladyship has already, if I may say, neatly drafted in verbal terms the orders, but I of course will take carriage of drafting that up, and submitting it to the court.

MRS JUSTICE O'FARRELL: Thank you, and thank you both for your very clear and helpful skeleton arguments.

MR COWAN: Thank you very much, my Lady.

MR SMITH: Thank you, my Lady.

MRS JUSTICE O'FARRELL: Thank you.

CERTIFICATE

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