Neutral Citation Number: [2020] EWHC 198 (Ch)

Case No: HC 2016-003385

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 4th February 2020

Before:

MR. RECORDER DOUGLAS CAMPBELL QC
(Sitting as a Judge of the Chancery Division)

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Between:

(1) LIFESTYLE EQUITIES CV	**Claimants**
(2) LIFESTYLE LICENSING BV	
(each company incorporated under the laws of the Netherlands	
- and -	
(1) SANTA MONICA POLO CLUB LIMITED	
(2) AZIRE GROUP LIMITED	
(3) CONTINENTAL SHELF 128 LIMITED t/a JUICE CORPORATION	**Previous**
(4) MR. ZUBAIR MUKHTAR ALI	**Defendants**
(5) MR. KASHIF AHMED	**Defendant**
(7) YOURS CLOTHING t/a BAD RHINO	
(11) HORNBY STREET LIMITED	**Previous**
t/a JUICE CORPORATION	**Defendants**
(12) MRS. BUSHRA AHMED	**Defendant**
(13) MO & A LTD t/a BE JEALOUS	
(14) BIGGCLOTHING4U LIMITED	
(15) EON CLOTHING LIMITED	**Previous**
(16) SIZE BASE LIMITED	**Defendants**

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MR. THOMAS ST. QUINTIN (instructed by **Brandsmiths**) for the **Claimants**

DR. TIM SAMPSON (instructed by **the Fifth and Twelfth Defendants**) for the **Fifth and Twelfth Defendants**

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Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. RECORDER DOUGLAS CAMPBELL QC:

1. This is the second trial of these proceedings according to an order made by Arnold J (as he then was) on 3rd April 2017, in particular paragraph 9 thereof. The first trial was expedited as ordered by paragraph 10 of the same order. I heard the first trial in 2017. In general terms, by way of summary, I found for the claimants and I handed down judgment on 21st December 2017.

2. Originally, there were no less than 16 defendants to this action. The claims against most of them have now settled. D3 and D11 are in administration and the claims against them are stayed pursuant to Schedule B1 of the Insolvency Act 1986. They were placed into administration on 16th January 2018, as is accepted in the Points of Defence, at paragraph 5. The action therefore proceeds against D5, Mr. Kashif Ahmed, and D12, Mrs. Bushra Ahmed, both private individuals. Without intending any discourtesy to either of them, I will refer to them as D5 and D12 for the purposes of this judgment. The same approach has been adopted in the case papers.

3. This second trial was originally listed to commence on 15th July 2019, but was adjourned by Penelope Reed QC, sitting as a deputy judge of this court, with what the judge stated was "enormous reluctance" on the grounds of evidence about D5's ill-health. It seems that part of the problem, though not all of it, was not merely D5's illness, but that D5 became a litigant in person and, presumably, D12 as well, on Sunday, 14th July, which was the day before the trial was due to be heard. The defendants (meaning D5 and D12) are represented today by Dr. Timothy Sampson. He submits to me, and I accept, that the defendants’ solicitors, although they were formally on the record, were not doing much for the defendants for some time prior to Sunday, 14th July.

4. D5 was ordered to pay the costs thrown away by the adjournment, which were summarily assessed in the sum of £39,100. D5 unsuccessfully sought permission to appeal that costs order and did not pay it.

5. On that occasion, the defendants did not seek an adjournment on the basis that there were pending proceedings against the administrators, nor on the basis that they were unable to obtain documents which supported their case. It is the claimants' submission that nothing has changed since then.

6. The present application before me is the defendants' second application to adjourn the second trial.

7. As originally issued on 24th January 2020, adjournment was sought on two grounds:

   i) there are proposed proceedings against the administrators of the former liability defendants in this case, that could result in appeal against the findings of trade mark infringement and thereby render the present claim of joint tortfeasorship against D5 and D12 void;

   ii) the claimants have frustrated all attempts to agree trial proper bundles with the fifth and 12th defendants.

8. These were not quite the grounds on which the application to adjourn was made in oral submissions to me. Point (i), relating to that potential appeal was indeed pursued but two further points, not in the application notice, were elaborated. One was about the alleged inability of the defendants to obtain further documents which they believed would support their defence. The other was a point raised in combination with the others, namely that the defendants said they lacked money. The point about bundling was not pursued until I expressly raised it.

9. The claimants' response to this application to adjourn generally, before one goes into the detail, is that the application is made very late. I agree, it is made very late. It is heard on day 1 of the trial. The claimants also submit there is no prospect of compensation if an adjournment is granted. I am less impressed with this point, because although it is true in theory, there may be no prospect of compensation anyway. I refer, in particular, to D5's failure to pay the costs that were ordered last time. The claimants also raise the question, which I believe is a very valid one, of: if the proceedings were to be adjourned, when would they come back? They submit that the delay would be indefinite and Dr. Sampson did accept it would *"no doubt be a considerable time"*.

10. The onus lies on the applicant for adjournment. I was referred to the Chancery Guide for the relevant principles relating to such applications. I prefer to take them from the judgment of Coulson J in *Fitzroy Robinson Limited v Mentmore Towers Limited* [2009], EWHC 3070 (TCC). In paragraph 9 of that judgment, the judge stated as follows:

> "More particularly, as it seems to me, a court when considering a contested application at the 11th hour to adjourn the trial, should have specific regard to:
>
> a) The parties' conduct and the reason for the delays;
>
> b) The extent to which the consequences of the delays can be overcome before the trial;
>
> c) The extent to which a fair trial may have been jeopardised by the delays;
>
> d) Specific matters affecting the trial, such as illness of a critical witness and the like;
>
> e) The consequences of an adjournment for the claimant, the defendant, and the court."

11. The parties have not expressly directed themselves to these points, but the submissions they did make overlap with these points to a very considerable extent. I will consider points (a)-(e) as follows.

<u>a) The parties' conduct and the reason for the delays;</u>

12. I begin with the defendants' first point, which is the possibility of an appeal following proceedings against the administrators of the former liability defendants in this case. I consider the timings are important here. I handed down my judgment on 21st December 2017, over two years ago. The order I made on that occasion runs to a

number of paragraphs. I would draw particular attention to paragraphs 4 and 5, where I granted declaratory relief in relation to the infringement and paragraph 21, where I rejected the defendants' application for permission to appeal.

13. No application was ever made (and still has not been made) to the Court of Appeal for permission to appeal. There have been no grounds of appeal at any time. The closest that I have seen is paragraph 46 of Dr. Sampson's skeleton argument for this application, where he sets out various points which he suggests could properly be incorporated into grounds of appeal to be put before the Court of Appeal in due course.

14. Dr. Sampson also explained to me it would take about a day for him to produce a more finalised document. I am not asked to grant permission to appeal against my order in the first trial. Indeed, I have already refused it. It does appear to me that, reading paragraph 46, it is not in fact necessary to go further than the judgment itself and perhaps the evidence given in the public trial in order to prepare grounds of appeal. I am not satisfied it would actually require any internal documents of the defendants at all.

15. It also appears to me that D5 and D12 could have also applied to the Court of Appeal themselves for permission to appeal against the declaration, at any rate, years ago. To be fair, Dr. Sampson did accept that the defendants, as individuals, could have made such an appeal. Of course, that was over two years ago now.

16. It also seems to me that the defendants were expressly advised of the ability to make such an application. My attention was drawn to two letters, both of which are exhibited by Mr. Ahmed. The first is a letter actually to Ms. Bushra Ahmed, D12, dated 22nd January 2018, by her then solicitors, Pannone Corporate LLP, which points out, in paragraph 2, as follows:

> "We write to confirm the solicitors instructed by the administrators appointed by Hornby Street Limited and Continental Shelf 128 Limited, have confirmed to us those companies will not be pursuing any appeal ... Any such appeal must be made by Wednesday, 24th January 2018. We have not received instructions from you personally to pursue an appeal."

17. In reply, Dr. Sampson drew my attention to a letter from Mr. Kashif Ahmed to Pannone requesting copies of various documents. However, that letter was sent on 28th September 2018, some considerable time after the original deadline for appeal had been passed. Furthermore, as I have said, I am not satisfied access to these documents was in fact required in order to produce grounds of appeal and there is still no application to the Court of Appeal today.

18. I also note that if this had been thought to be good grounds for seeking adjournment, the first adjournment could have been sought on this basis at the hearing in July 2019. However this point was not raised on that occasion. Any such appeal would be even further out of time now.

19. One point taken by Mr. Ahmed in his written evidence, but not pressed orally, is Mr. Ahmed's belief that the administrators of D3 and D11 are in collusion with the claimant and this is the reason why no appeal was pursued. I appreciate that is his

belief, but it was not developed in oral submissions and I have been shown no evidence to support his view that this is the case.

20. My attention was, however, drawn to proceedings brought by Habib Bank against D3 and D11, plus another company called Wembley Menswear Limited. In particular, on 21st January 2019, the Habib Bank issued a statutory demand, which was in fact the second such demand, upon D5 for £1 million in relation to a personal guarantee provided by him to Habib Bank as security for facilities given to the three companies. Further details are given in the witness statement of James Richard Lappin, dated 17th January 2020, at para 6.2.

21. D5 made an application to set aside the statutory demand. That application was heard by District Judge Bever in the County Court at Manchester in August 2019, and judgment was handed down on 11th November 2019. The judgment runs to 23 pages and 123 paragraphs. By way of very brief summary, District Judge Bever held it was appropriate to set aside the statutory demand, and he also criticised the bank for not using the Part 7 procedure.

22. As I understand it, there is no counterclaim issued as yet. Dr. Sampson says he has been assured there was a letter before action ready to be issued against the bank, but I was not shown any such letter.

23. In any event it seems to me that these separate County Court proceedings in Manchester are a very long way removed from issuing an appeal out of time against my original order at the first trial. *Prima facie*, setting aside the statutory demand is the first step of what may be a long dispute between the bank and D5 about the matters set out in detail in District Judge Bever's judgment.

24. The claimants submitted that so far as these present proceedings are concerned, District Judge Bever's judgment did not change anything. I agree. It was an interim judgment, not a final judgment. It is a claim against a different person. Even if that action did succeed, it seems to me it is a long way from having any effect on the present proceedings.

25. In any event, there has been some delay, even since then. For instance the judgment of District Judge Bever was handed down on 11th November 2019. In addition the defendants have already had advice from Mr. Davies QC, their counsel in those county court proceedings, for some time before that. For instance he served a skeleton argument in August 2019.

26. I then come to the request for documents. By this, I refer to the defendants' submission that a fair hearing is not possible, absent further documents which they have been unable to obtain. I think it important to begin with the background. I was referred to an order by Marcus Smith J dated 14th June 2018 which requires these defendants to serve documents on which they rely, by 9th August 2018. It appears to me from reading the case papers there was a nil return as at that time. It seems to me it must have been obvious as of 9th August 2018, if not before, that the defendants did not have the documents which they now say are necessary.

27. However, no application was made to court to compel production of any such orders. Instead, there was merely a series of requests in correspondence made to the

administrators, some of which were framed under, I understand, the Data Processing Act. I was also reminded by the claimants that it is in fact two years since Mr. Ahmed was made aware of the prospect of bringing proceedings in respect of the administrators.

28. Thus not only was no such application ever made, but if any such application had to be made, it should have been made long ago. I therefore accept counsel for the claimants' submission that nothing has changed recently in this respect either. Certainly nothing has changed so as to justify an adjournment.

29. That brings me to the next point about lack of money. This is relied on in combination with the other arguments. I agree with the claimants, that this is not a reason for an adjournment as such. In addition this is something which seems to have been the position for some time as well. It is not a recent development.

30. There was a submission made by Dr. Sampson that there was more to this hearing than merely money. In particular, there was a desire by the claimants to bankrupt Mr. Ahmed. To this the claimants made the very good response, that if they wished to do that, they could already have done so, because they were already owed £39,100, which is well over the statutory limit.

31. So, if I stand back and ask myself the first question, in summary, the reasons for the delays are all due to the defendants failing to take steps earlier that they could, and, in my judgment, should, have taken.

<u>b) The extent to which the consequences of the delays can be overcome before the trial;</u>

32. I can be very brief about this, because so far as the lack of appeal is concerned, it cannot be overcome before trial. So far as the lack of documents is concerned, there never has been any application to compel disclosure and there still is not. That is not going to be overcome either.

<u>c) The extent to which a fair trial may have been jeopardised by the delays;</u>

33. In my judgment, a fair trial has not been jeopardized because of any delays. Insofar it has been jeopardized at all, it is , because of the defendants' inaction and the failure to take steps which they should have done earlier. I do appreciate the defendant may have evidential difficulties at the trial, given the lack of documents which it now says are important. However that problem was created by the defendant failing to pursue any application for such documents and seeking adjournments on other grounds instead.

34. In any event, it is not true to say that there is no evidence at all about the defendants' costs. For instance, there is evidence from the claimants about the estimated profit margin the claimants believe the defendants would have made; evidence from the defendants’ own published accounts; and the defendants themselves have put in evidence from a Mr. David Clegg, setting out their best estimate as to the correct costs.

35. I have already said that the problems in which the defendants find themselves are problems of their own making for not gathering the evidence they now say is necessary. I feel this is particularly so after the trial was adjourned the first time, because that would have been the time for the defendants to ensure that their case was in order.

d) Specific matters affecting the trial, such as illness of a critical witness and the like;

36. Nothing was said about specific matters affecting the trial, such as illness of a critical witness and the like, and therefore I do not say anything about that.

e) The consequences of an adjournment for the claimant, the defendant, and the court."

37. Finally, I consider the consequences of an adjournment for the claimants, the defendants and the court. The consequence for the claimant is that the claimant is kept out of its money for even longer. It is true that it may get interest but it may not recover that anyway. In any event the claimants are presumably aware of such matters and it does not appear to me that I can properly second-guess the claimants in this area.

38. More particularly, the claimants are prepared and ready for the hearing and want the hearing to take place in the interests of finality. On behalf of the court, I accept there is interest in both finality and certainty in litigation. One does not want yet another open-ended adjournment such that the case hangs around for years more, particularly when it is largely due to the defendants' inaction.

39. So far as the defendants are concerned, I do appreciate the defendants want to put off this second trial for the second time. I am not entirely sure it is even in the defendants' own interest to have a second adjournment because that simply prolongs the inevitable, in my view.

Conclusion

40. It is when I consider all these matters in the round, it seems to me very clear that I must reject this application, for all the reasons I have just given, and the trial will therefore proceed. That is my judgment.

(For continuation of proceedings: please see separate transcript)

41. I now have to deal with the issue of costs. In my judgment, it is extremely clear that the defendants should be paying the costs of this application, because it was their application which was made and failed, and, to be fair, Dr. Sampson has not strongly resisted that.

42. The more difficult question is whether I should award costs to be assessed on the indemnity basis, in particular whether it is sufficiently so far out of the norm that I should do so. It is true that the application failed for a number of reasons. Dr. Sampson asked me to bear in mind, as I do, that the defendants operate as litigants in person. As against that, the same rules are to apply to litigants in person as to anyone else. There is no different set of rules.

43. He also makes the point, which I think is a valid one, that if the application had been brought earlier, meaning in the last few weeks, it would also have had to have been dealt with, and probably taken about the same amount of time, so the defendants should not be penalised for doing so at the beginning of the trial.

44. I am not satisfied this is so exceptional as to justify the award of indemnity costs, but I will require the defendants to pay the costs on the standard basis.

(For continuation of proceedings: please see separate transcript)

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