

[2020] EWHC 3739 (Ch)

Case No: PT-2019-MAN-000098

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
PROPERTY TRUST & PROBATE LIST (ChD)**

Civil Justice Centre
1 Bridge Street West
Manchester
Greater Manchester
M60 9DJ

Monday, 23 November 2020

BEFORE:

HIS HONOUR JUDGE HALLIWELL (Sitting as a Judge of the High Court)

BETWEEN:

**(1) MANCHESTER AIRPORT PLC
(2) MAG INVESTMENT ASSETS LIMITED**

Claimants

- and -

**(1) RADISSON HOTEL MANCHESTER LTD
(2) UNION INVESTMENT REAL ESTATE GmbH**

Defendants

MR MARTIN HUTCHINGS, QC (instructed by Eversheds Sutherland LLP) appeared on behalf of the Claimants

MR ADAM ROSENTHAL, QC (instructed by Marriott Harrison LLP) appeared on behalf of the First Defendant

MR SIMON ATKINSON (instructed by Travers Smith LLP) appeared on behalf of the Second Defendant

APPROVED JUDGMENT

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1. HIS HONOUR JUDGE HALLIWELL: The First Defendant applies for permission to rely on the witness statement of Richard Coburn dated 9 November 2020 and the second witness statement of Bahram Sadr-Hashemi dated 3 November 2020. It does so at the commencement of the hearing of the preliminary issue about the meaning of the expression "prevailing commercial rates" in clause 5.3.2 of a lease dated 5 October in respect of business premises incorporating a hotel at Manchester Airport.
2. Permission is required since, by his order dated 3 April 2020, Deputy District Judge Lewis required all witness statements to be served by 4.00 pm on 30 September on the basis that the oral evidence of a witness whose evidence had not been served in accordance with that direction would not be permitted except with the permission of the court.
3. Permission to rely upon Mr Hashemi's second witness statement is not opposed subject to a costs qualification. Mr Rosenthal QC has not responded specifically on the costs issue but, unless he wishes to address me further on the point, I shall formally give the First Defendant permission to rely upon Mr Hashemi's second witness statement on the basis that the costs of and incidental to this part of the application are the Claimants' costs in the case.
4. The application in relation Mr Coburn's witness statement is opposed and it raises specific issues.
5. The first issue is whether it involves an application for relief from sanction and thus requires me to apply the familiar principles in *Denton*.
6. In setting a date for the delivery of witness statements and then expressly providing that, if witness statements are not served by that date, evidence will not be permitted without the permission of the court, a sanction for non-compliance was prescribed. I am thus satisfied that the principles governing relief from sanction in *Denton* apply but, in the hypothetical event they do not, they provide helpful guidance on which I shall draw by analogy when exercising my discretion.

7. The first stage of the *Denton* guidance requires me to identify the seriousness and significance of the failure. In my judgment, the First Defendant's failure to obtain and serve Mr Coburn's witness statement well in advance of the hearing is a serious and significant failure. Deputy District Judge Lewis's order provided that witness statements were to be served according to a fixed time scale, well in advance of trial, with sufficient time for the parties to prepare their case and attend to the required formalities. Today is listed for the substantive hearing of the preliminary issue. If I give the First Defendant permission, the Claimants will seek to rely upon additional evidence, including the witness statement of Mr Melrose. It will inevitably throw up case management issues which would have been entirely un-necessary had the First Defendant attended to the service of its evidence earlier. I am satisfied that the First Defendant's failure to comply with Deputy District Judge Lewis's order is serious and significant.
8. The next stage is to consider why the default occurred. There is not, in my judgment, a satisfactory explanation. The First Defendant submits that it seeks to respond to the evidence filed by the Claimant. However, when Deputy District Judge Lewis made his original order, no provision was made for evidence to be filed in response to the witness statements which were exchanged in September. In any event, the application is submitted late and in some respects, the evidence upon which the First Defendant now seeks to rely transcends the issues raised in the evidence that has so far been filed. I have not seen a witness statement with a proper explanation for the First Defendant's default.
9. At the third stage, I must evaluate the overall circumstances of the case and deal justly with the application. Consistently with the submissions of Mr Rosenthal QC, I can take into consideration the disadvantage or prejudice to the parties of allowing or excluding the evidence. However, I must also bear in mind the need for litigation to be conducted efficiently, at proportionate cost and to enforce compliance with the rules, practice directions and order.
10. Having evaluated the circumstances as a whole and applied these principles, I am not satisfied I should allow the application.

11. Whilst the evidence of the witnesses is admissible, for the purposes of construction, in relation only to the surrounding circumstances at the time the parties entered into the lease, Mr Hutchings QC submits, on behalf of the Claimants that, if the First Defendant is permitted to rely upon the evidence of Mr Coburn, he will require the opportunity to call Mr Melrose to give evidence. In anticipation, he has thus filed a witness statement from Mr Melrose. Conversely, Mr Rosenthal submits that, if this is allowed to happen, prejudice will be occasioned to his client. For that reason, he submits the evidence of Mr Melrose should be excluded. Mr Rosenthal's objections to Mr Melrose's evidence are not without foundation but if I simply exclude his evidence this will pre-empt any opportunity the Claimants might otherwise have had to put in evidence in response to Mr Coburn's evidence.
12. Much of Mr Coburn's witness statement is hearsay evidence. To the extent it is only of limited probative value, it does not lend significant weight to the application itself. However, if I simply admit Mr Coburn's witness statement on the basis sought without giving the Claimants a proper opportunity to respond, there is a significant possibility this will cause them prejudice.
13. There cannot be any reasonable justification for adjourning the trial to give the parties an opportunity to consider the evidence further and file further evidence. No one invites me to do so. To do so would be fundamentally inconsistent with the requirements of the Overriding Objective, in particular the need to deal with cases at proportionate cost, expeditiously and allotting to them an appropriate share of the court's resources.
14. In all those circumstances, I shall refuse the First Defendant's application for permission to rely upon the evidence of Mr Coburn.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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