IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 3509 (Comm)

No. CL-2020-000561

Rolls Building
London EC4A 1NL

Monday, 20 December 2021

Before:

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

B E T W E E N :

(1) VARIOUS AIRFINANCE LEASING COMPANIES
(listed at Schedule A to the claim Form)
(2) ALIF SEGREGATED PORTFOLIO COMPANY & Ors — Claimants

- v -

SAUDI ARABIAN AIRLINES CORPORATION — Defendant

-and-

INTERNATIONAL AIRFINANCE CORPORATION — Third Party

MR T. SPRANGE QC (of King & Spalding International LLP) appeared on behalf of the Claimants and the Third Party.

MR G. ROBERTSON (instructed by Norton Rose Fulbright) appeared on behalf of the Defendant.

J U D G M E N T

JUDGE PELLING QC:

1 This is an application by the defendant for a yet further extension of time in which to serve witness statements. It is not necessary that I rehearse at length the various extensions that have been agreed and ordered over time. Mr Sprange QC, on behalf of the claimants, asserted (and it is not in dispute) that there have been seven, albeit relatively short, extensions of time given to the defendant in which to file evidence. I can pick up the chronology by saying that the relevant time for the delivery of the evidence following the final agreed deadline was 9th December last. Rather than serving witness statements on 9th December as required by that agreement, on 8th December 2021 the defendant issued an application for yet a further extension of time in which to file evidence, this time until 16th December 2021. The 16th December 2021 came and passed without the defendant serving any witness statements, but on 15th December 2021, the defendant requested in correspondence a further extension down to 23rd December 2021.

2 The only application before the court therefore is technically for an extension to 16th December 2021, but it was submitted by Mr Robertson, on behalf of the defendant, that the application enabled the court to grant an extension to 23rd December 2021 if otherwise it was minded to do so. I accept that submission, not least because it is not seriously or indeed at all disputed by Mr Sprange. His position in relation to all of this, summarised in para.6 of his skeleton argument, is that if the order sought is to be granted, then it should be on terms which make it abundantly clear that, in the absence of compliance, then various adverse procedural consequences will flow for the defendant.

3 The procedural consequence identified in para.6.1 was for either the immediate striking out or the liberty to strike out those parts of the defendant's statement of case to which the witness statements that have not been served relate. Mr Robertson opposed such an order as wrong in principle because it would require the production of the witness statements, notwithstanding the expiry of the time limit, in order to identify which parts of the statement of case would be struck out. I accept that submission. Where an application is made for an extension of time in which to serve witness statements where there have been serial failures to comply with previous orders a court will normally direct that the party concerned will be precluded from adducing oral evidence from any witness whose statement is not served by a fixed future date.

4 The second order that Mr Sprange sought was an order require the filing of an affidavit setting out when the preparation of each witness statement commenced and was completed. I know of no precedent which provides for the making of such an order. I am unpersuaded that it would achieve anything useful to make such an order, and I perceive enormous difficulties in making an order without impermissibly interfering with the defendant's legal professional or litigation privileges. So on the grounds that it is not necessary, not reasonable, not proportionate and will achieve no useful purpose, I decline to make an order in those terms.

5 Finally, Mr Sprange indicates that there should be an order for costs on an indemnity basis in relation to the application, having regard to the history of non compliance to which I have referred. That is an issue which we can come to once I have decided what substantive order to make.

6 The grounds on which this current application is advanced are summarised in para.10 of the eleventh witness statement of Mr Springthorpe at sub-paras.(a) through (g). Mr Sprange QC submitted that, upon proper analysis, none of these justified the further extension sought, and certainly did not having regard to the history of extensions sought and agreed over the history

of this litigation. He made the point, which I accept, that the rules relating to the conduct of commercial litigation in the Commercial Court provide for close case management at an early stage, both parties are expected to prepare rigorously for the case management conference, and the expectation of all parties is that the orders made at the case management conference set the timetable for progress to a trial and are to be complied with unless there is a change of circumstances. Mr Sprange submits therefore that it is to be expected that both parties will come to the CMC suitably informed as to what is practical and realistic in relation to time estimates for the preparation of evidence and the like. Mr Sprange submits, and I agree, that the starting point wherever an application for an extension is sought, is that it requires justification by reference to unanticipated developments usually occurring after the CMC.

7 Turning therefore to para.10 of Mr Springthorpe's witness statement, para.(a) refers to Covid restrictions imposing significant restrictions on who, from his firm, could travel to Saudi Arabia. That, with respect, and as Mr Sprange submits, is a situation which has applied at all material times and cannot justify, of itself or in combination with any other factor, an extension, having regard to the procedural history in this case.

8 It is then said that not all of the witnesses are in the control of Saudia, and certain particular witnesses are identified. But that is an issue too which ought to have been considered when the directions for the service of evidence were set at the CMC. It is not suggested that the lack of control was something that occurred after the CMC and had not been or could not treasonably have been anticipated. It is then said that the process is not made easier by the mismatch of working weeks between the UK and Saudi Arabia but, again, anyone who has any experience of litigation or arbitration in the Middle East knows that there is a mismatch of working weeks between that in the Middle East on the one hand and Europe on the other. That mismatch cannot justify an extension of time, because that was, or ought reasonably to have been, known to all parties at the time when the CMC orders were made.

9 So far as (d) is concerned, it is said that two of the associates in this case were working with junior counsel in a two-week trial in another matter. That, with respect, is not a justification either for extending time. It may be an explanation as to why it is that orders have not been complied with, but it is not acceptable in commercial litigation of this size for that to be advanced as an excuse, when global law firms are involved in the process. This is all the more the case now because the scope of witness statements is confined by the Practice Direction applicable to their preparation to statements that contain the witness' own personal recollections, and prohibits commentary on documents or the like. This should simply the process of preparation and shorten the process of review and finalisation. It is then said that there was some unsatisfactory issues concerning disclosure, but to my mind that does not, of itself at least, explain why it is that the witness statements could not be completed within the time that had been agreed, having regard to the point I made just a moment ago about the scope of witness statements.

10 Overall, I have to say I have come very close to refusing this application at this stage. It is simply not acceptable that commercial litigation should be conducted in this way in the context of a trial starting on 22nd March next year. Nonetheless, Mr Robertson has just persuaded me that there should be an extension of time but, in my judgment, it must be made subject to the very firmest conditions concerning what is to happen if the order is not complied with. I accept that as between the two alternative dates advanced - that of 20th December contended for by Mr Sprange, which is today, and 23rd December, which is contended for by the defendant and is this coming Thursday - there is little or no purpose for adopting the 20th, as opposed to the 23rd. Adopting the earlier date simply increases the risk of failure and confers no discernible benefit on the claimants.

11 I am therefore prepared to extend time until 4.00 p.m. on 23rd December. However, it will be on the following terms. First, in the event that no witness statements are served by 4.00 p.m. on the 23rd, then the defendants will be debarred from adducing any oral evidence at trial. Secondly, the defendants will be debarred from adducing evidence from any witness whose statement has not been provided by that date and time. I recognise that this does little more than give express effect to CRP Rule 32.10, but it is designed to ensure that all parties understand that this is a sanction imposed by the court, in respect of which relief from sanctions would have to be sought, and the tripartite requirement for the successful application for relief from sanctions satisfied if its effect is to be avoided. Thirdly, and finally, again for the avoidance of any misunderstandings or doubt, I will give permission to the claimants to apply to strike out the defendant's pleadings in these proceedings in the event that no witness statements are served by the appropriate time or to strike out parts of the defendant's pleadings having regard to the contents of the witness statements that are in fact served. Subject to those conditions, I will, however, extend time as sought by the defendant.

LATER

12 This is an application for the costs of and occasioned by the application for an extension of time. The claimants submit that they have been successful and therefore ought to receive their costs of and occasioned by the application. I agree that the claimants should recover their costs. Technically the defendants have succeeded in obtaining an extension but they only had to apply for the extension obtained because of serial non compliance with the order made originally and with the various extensions that followed. The claimant's position on this application was one they were fully entitled to adopt and directing the defendant to meet the costs of the application is plainly appropriate having regard to the order that I have made.

13 The second point they make is that costs should be assessed on the indemnity as opposed to the standard basis. The test that applies for whether or not costs on an indemnity basis should be ordered is that identified by the Court of Appeal in *Excelsior* and is concerned with conduct which is outside the norm to be expected, or substantially outside the norm to be expected, for litigation of the class concerned.

14 This is high value commercial litigation being conducted by global full service law firms and highly experience specialist counsel in which high standards of compliance are legitimately to be expected. The defendants have fallen substantially short of that expectation by not complying with seven previous extensions notwithstanding that the trial is due to start on 22 March 2022. Mr Robertson submits, and I accept, that some of the extensions were for a relatively short time, but that is not the point. The point that has be to borne in mind is that the extensions were agreed but then not been complied with. It is that feature together with the sheer number of extensions that takes this case outside the norm, together with the nature of the grounds advanced for seeking this, the latest, extension. In my judgment, in the circumstance of this case, it is plainly appropriate that costs should be directed to the paid on the indemnity basis and therefore that is the basis on which I propose to summarily assess those costs if invited to do so.

LATER

15 This is a summary assessment of the claimants' costs in relation to the application I disposed of a few moments ago. I have directed that the costs be assessed on a summary basis. The test that I have to apply does not have regard to proportionality but only reasonableness, with

the claimants being entitled to recover payment for the work which it was reasonable for the claimants to carry out in the circumstances, and in respect of such work a reasonable amount.

16 The first issue which arises concerns hourly rates. As I indicated in the course of the argument, the statement of costs has been denominated in dollars throughout and then the grand total converted to sterling. That is an unsatisfactory way of proceeding because it makes it impossible to arrive at judgments as to the rates which are being claimed, for example, without converting the hourly rates adopted. In fact I was able to do that for myself prior to the hearing. It is plain that the hourly rates claimed by the claimants' solicitors are substantially in excess of what is reasonable being massively in excess of even the London 1 guideline rates published by the Master of the Rolls for use in summary assessment only as recently as the middle of last August. So, for example, Mr Jawad Ali's hourly rate is £1,083-odd; Mr Sprange's is £1,045-odd, Ms Walker's is £1,030-odd. Each of those are grade A fee earners. Even if I were to adopt the London 1 rate (which I indicate immediately is one I accept because it is, in effect, conceded), the guideline rate for London 1, that is to say for very heavy commercial litigation by centrally-based London law firms, is £512 an hour. So far as the grade B fee earners are concerned, those are Mr Bhalla and Ms Warwick. Mr Bhalla's rate is £697 an hour, Ms Warwick's £663 an hour. The London rate for a grade B fee earner is £348 an hour. So far as the grade C and grade D fee earners are concerned, those figures are also massively in excess of the guideline rates.

17 This is not an appropriate way to proceed in relation to summary assessment even on an indemnity basis. The sums which I have identified are in excess of what is reasonable in the circumstances. I accept that in relation to a summary assessment on an indemnity basis, it may be appropriate to adopt rates that are marginally in excess of the guideline rates but what is reasonable depends ultimately not on the value of the litigation as a whole but on the nature of the application in respect of which costs are sought. This was a relatively straight forward application for an extension of time to serve witness statements. Whilst I am prepared to adopt the London 1 rates, essentially on the basis of an acceptance by the defendant that that is appropriate in the circumstances, given the nature of the application it is entirely inappropriate that I should attempt to exercise whatever jurisdiction I have to assess costs by reference to a rate that is higher than the guideline rate. Anything in excess of the guideline rate has to be justified, and Mr Sprange realistically has not attempted to do so. Therefore all sums for which payment is due under this assessment will be calculated at the London 1 guideline rates applicable for the appropriate fee earners.

18 I remind myself that since this is a summary assessment, the benefit of the doubt, both as to the work done and the sums charged for such work in terms of the hours spent on it, is to be accorded to the receiving party and against the paying party. I accept Mr Sprange's submission that in relation to internal costs, the relevant comparator is between what would take place between a major London law firm and external leading counsel. I agree that is so in principle. Whilst the work done is on the high side, having regard to the fact that this is an indemnity costs basis, I accept that in principle those sums should be recoverable.

19 What I do not accept is appropriate, even on an indemnity basis assessment, is the notion that there should be no less than seven fee earners attending a hearing such as this. I accept that, having regard to be importance of the application to Mr Sprange's clients, it was appropriate that him to appear. What I do not accept is that it is appropriate to have all the other fee earners attending at the hearing. I am prepared to allow, having regard to the fact that this is an assessment on an indemnity basis, the attendance of Ms Walker, but I disallow the attendance of all others.

20 So far as work on documents is concerned, Mr Sprange realistically accepted that there was what he called " a haircut" to be taken here, having regard to the concession he made as to what applications costs were to be recoverable for. I am satisfied that it is appropriate that he should recover the work done on the skeleton argument, as identified. I am satisfied that he should recover his costs of preparing for the hearing and I am satisfied that Ms Walker should also recover her costs for the preparation for the hearing, consistent with what I indicated a moment ago concerning attendances for the purposes of this application. What I do not accept is that any of the other fees for preparation should be permitted. I allow the costs of preparing the schedule of costs as claimed, and I allow the costs of working on the cross-application, preparing the exhibit, and reviewing the exhibit as claimed, that is to say lines 5, 6 and the second 6. I do not accept that line 1 is recoverable, having regard to the concession that is made, and I accept Mr Robertson's submissions concerning 2, 3 and 4.

21 Overall, therefore, the costs that will be recoverable on this assessment are those that I have indicated are recoverable, assessed at the guideline rate applicable for the fee earner concerned at the London 1 rate. Unless I hear to the contrary from Mr Robertson, that is to be paid within 14 days of today.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.