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Case No: CL-2022-000219

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

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

Date: 09/06/2023

Before :

SIMON RAINEY KC (sitting as a High Court Judge)

Between :

(1) MOTOROLA SOLUTIONS, INC.
(2) MOTOROLA SOLUTIONS MALAYSIA
SDN.BHD

Claimants

- and -

(1) HYTERA COMMUNICATIONS
CORPORATION LTD. (2) HYTERA AMERICA,
INC. (3) HYTERA COMMUNICATIONS
AMERICA (WEST), INC.

Defendants

**TOM SPRANGE KC and GAYATRI SARATHY (instructed by King and Spalding
International LLP) for the Claimants**
**STEPHEN RUBIN KC and ALEXANDER MILNER KC (instructed by Steptoe & Johnson
UK LLP) for the First Defendant**

Hearing date: 24 May 2023

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:00 on Friday 9th June 2023.

SIMON RAINEY K.C.:

1. There are two applications before the Court, one brought by the First Defendant (“Hytera”) and a cross-application by the Claimants (“Motorola”). They are made in the Claimants’ proceedings against the First and other Defendants in action CL-2022-000219 (“the Enforcement Proceedings”).

The procedural background

2. The applications arise in the following way. (I gratefully adopt and adapt the procedural summary given by Picken J. on a previous application relating to service of the current proceedings in *Motorola Solutions, Inc., Motorola Solutions Malaysia SDN BHD v Hytera Communications Corporation Ltd.* [2022] EWHC 2887 (Comm).)
3. The Claim Form in the Enforcement Proceedings seeks the enforcement of a judgment of the US District Court for the Northern District of Illinois Eastern Division (“the Illinois Court”) dated 5 March 2020 against the Defendants and in favour of Motorola (“the Illinois Judgment”). Pursuant to the Illinois Judgment, the Defendants were found to be jointly and severally liable to Motorola for some US\$600 million. That judgment remains unsatisfied.
4. The Proceedings are at an early stage, with Particulars of Claim having been served on 20 January 2023. Mr Rubin KC, who appeared for Hytera, submitted that the Proceedings will be resolutely contested on various grounds.
5. The Enforcement Proceedings were preceded by earlier proceedings brought by Motorola against the present (and other) Defendants under section 25 of the Civil Jurisdiction and Judgments Act 1982 and were proceedings which sought freezing order relief against those Defendants in the context of prospective proceedings to enforce the Illinois Judgment (“the Freezing Order Application”).
6. That Freezing Order Application came before Mr Justice Jacobs on 9 April 2020, who granted the relief sought. Subsequently, however, on 11 January 2021, the order granting that relief was set aside by the Court of Appeal.
7. In allowing the appeal, (inter alia on the basis that no risk of dissipation had been established and that certain evidence relied on by Motorola was without prejudice and inadmissible) the Court of Appeal as part of its Order of 11 January 2021 made a costs order against Motorola (“the Court of Appeal Costs Order”).
8. As this lies at the core of the present applications, it is important to note its terms. They can be summarised as follows:
 - i. Paragraph 5 ordered Motorola to repay to Hytera £132,098.49 which Hytera had paid to Motorola in respect of the original freezing order application, plus interest at 3%.
 - ii. Paragraph 6 ordered Motorola to pay Hytera’s costs of the appeal, to be the subject of a detailed assessment.
 - iii. Paragraph 7 ordered Motorola to pay Hytera £125,000 on account of the costs of the appeal.

- iv. Paragraph 8 ordered Motorola to pay Hytera's remaining costs of the proceedings, to be the subject of a detailed assessment.
 - v. Paragraph 9 ordered Motorola to pay Hytera £250,000 on account of the remaining costs of the proceedings.
9. On Motorola's application, the Court of Appeal stayed its Costs Order pending determination of an application by Motorola to the Supreme Court for permission to appeal.
10. On 23 February 2022 the Supreme Court refused permission, holding that the proposed appeal raised no question of general importance, alternatively would be bound to fail.
11. In accordance with the terms of the Court of Appeal Costs Order, the sums dealt with in the Order, totalling some £509,932 became immediately payable by Motorola.
12. Motorola was also ordered by the Supreme Court to pay Hytera's costs of the application to the Supreme Court, which were subsequently agreed between the parties in the sum of £6,987.23 ("the Supreme Court Costs Order").
13. It is important to note that no application of any sort was made by Motorola to the Court of Appeal, either before its application for permission to appeal to the Supreme Court or following its dismissal, seeking a stay of the Costs Order relying on the existence of the Illinois Judgment as making it inappropriate to make the Court of Appeal Costs Order either at all or as justifying a stay of execution of that order pending the bringing of enforcement proceedings by Motorola or seeking the right to make payment into Court of the costs covered by it, rather than the immediate payment of the costs to Hytera and the Defendants. Similarly, no application was made to the Supreme Court in respect of its Costs Order.
14. Despite multiple requests by Hytera for payment, Motorola has not paid any of the costs pursuant to the Court of Appeal Costs Order and the Supreme Court Costs Order (together "the Costs Orders"). Prima facie therefore Motorola is and has been in breach of the Costs Orders for over a year.
15. On 22 April 2022 Motorola commenced the present Enforcement Proceedings.
16. There was an issue between the Parties as to valid service which came before Picken J. in November 2022, resulting in the judgment to which I have referred above. He dismissed arguments by Hytera that service had not validly been effected and ordered Hytera to pay Motorola's costs in the sum of £110,000 which were set off against the costs outstanding under the Costs Orders, resulting in an unsatisfied liability on the part of Motorola under the Costs Orders of £406,919.50.
17. At the hearing before Picken J, the question arose of a stay of the Enforcement Proceedings pending Motorola's compliance with the Costs Orders. Picken J. at [47] stated:

"Whilst I need to be cautious in expressing a view as to the merit of those arguments, given that I instinctively have some sympathy with the submission made by Mr Rubin that a costs order made by the Court of Appeal in this jurisdiction is an order which ought to be complied with regardless, nonetheless I

am satisfied that it would not be appropriate for me to deal, almost on-the-hoof, with a stay application which has not even been made the subject of a formal application.”

18. He accordingly directed that any application for a stay be made by Hytera by 25th November 2022. This led to the making of the first application now before me.

Hytera’s application for a stay of the Enforcement Proceedings

19. Hytera applies for an Order that the Enforcement Proceedings be stayed until Motorola complies with the outstanding Costs Orders. The application is made pursuant to the Court’s inherent jurisdiction to refuse to hear a party who is in breach of its orders (as explained in cases such *Hadkinson v Hadkinson* [1952] P. 285 and *Days Healthcare UK Ltd v Pihsiang Machinery* [2006] 4 All ER 233 and CPR 3.1(1) and/or 3.1(3)(a)).

Motorola’s response and cross-application

20. Motorola initially responded to that application by offering to pay the outstanding costs into its solicitors’ client account but that was refused by Hytera. Motorola then contended on 20 January and 17 February 2023 that there was no outstanding debt or sum owed under the Costs Orders by reason of a legal, alternatively equitable, set-off arising from of the Illinois Judgment, which had extinguished the debt. (At the hearing before me and in its Skeleton Argument, Motorola did not pursue its argument that there was a legal set-off and confined itself purely to an argument of equitable set-off.)
21. On 18 April 2023 Motorola, without prejudice to that position, issued its cross-application seeking that the outstanding costs be paid into Court pending the determination of the Enforcement Proceedings pursuant to CPR 44.2, alternatively that there be a stay of execution of the Costs Orders pending that determination. As developed in its Skeleton Argument and orally before me by Mr Sprange KC for Motorola, the argument was (sensibly in my view) confined to an order seeking payment of the costs into Court.

The issues before the Court

22. The issues before the Court on the two applications, taken together, are therefore as follows:
- i. Is there an equitable set-off such that Motorola is not in breach of or is not obliged to comply with the Costs Orders?
 - ii. If there is not, should the Enforcement Proceedings be stayed pending Motorola’s compliance with the Costs Orders?
 - iii. Should the Court order that the sums due under the Costs Orders be paid into Court?

Issue 1: Equitable Set-Off

23. Motorola contends that it is entitled to rely upon an equitable set-off of the debt represented by the Illinois Judgment, even before a judgment declaring its

enforceability in the Enforcement Proceedings, against its liability to pay costs to Hytera under the Costs Orders imposed for its abortive Freezing Order Application.

24. The applicable principles in relation to equitable set-off were analysed in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] 4 All ER 847 (CA) and were summarised and distilled by George Leggatt QC (as he then was) sitting as a deputy High Court Judge in *Fearn v Anglo-Dutch Paint & Chemical Co Ltd* [2011] 1 WLR 366. This was common ground between the Parties.
25. The principles for present purposes may be stated as follows:
 - i. Equitable set-off is available where a cross-claim is “so closely connected with [the claim] that it would be manifestly unjust to allow [the claimant] to enforce payment without taking into account the cross-claim”: *Geldof* [43(iv)]; *Fearn* [20].
 - ii. The nature of an equitable set-off is not to extinguish or reduce either claim but only to prevent each party from enforcing or relying on its claim to the extent of the other claim where the connection between the claims would make this manifestly unjust: *Fearn* [26].
 - iii. The two claims cannot be netted off so as to extinguish each liability to the extent of the other except by agreement or a judgment of the court and once both liabilities have been established by agreement or judgment: *Fearn* [50].
 - iv. Instead, where the two claims are (i) made reasonably and in good faith and (ii) so closely connected that it would be manifestly unjust to allow one party to enforce payment without taking into account the cross-claim, neither party may exercise any rights contingent on the validity of its claim except in so far as it exceeds the other party’s claim: *ibid*.
26. Motorola no longer contends that the debt and liability under the Costs Orders is extinguished. It accepts that that could only occur on judgment in the Enforcement Proceedings as Hytera contends (see Hytera’s Skeleton Argument at paragraph 25(2)).
27. Rather, it now argues that it would be unconscionable (see Derham on Set-Off, 4th Edn, at para. 4.30) for Hytera to enforce and recover under the Costs Orders without the much larger judgment debt being taken into account against it.
28. Summarised, Motorola’s case is that (a) its claim to enforce the Illinois Judgment is made reasonably and in good faith; (b) the judgment debt in respect of the damages awarded for copyright infringement etc is closely related to the claim by Hytera for the costs ordered in the Freezing Order Application by the Costs Orders; (c) it would be manifestly unjust to allow Hytera to enforce or take advantage of those Costs Orders (e.g. by obtaining a stay) without taking account of the judgment debt and claim in respect thereof; (d) the result is that Hytera should not be allowed to exercise its right to rely upon or enforce the Costs Order in its favour by obtaining a stay in support of those Orders.
29. In relation to steps (b) and (c), as noted by the Court of Appeal in *Geldof* (at [43(v)]):

“I do not think that one should speak in terms of a two-stage test. I would prefer to say that there is both a formal element in the test and a functional element. The importance of the formal element is to ensure that the doctrine of equitable set-off is based on principle and not discretion. The importance of the functional element is to remind litigants and courts that the ultimate rationality of the regime is equity. The two elements cannot ultimately be divorced from each other.”

30. Step (a) is not challenged by Hytera. Combined steps (b) and (c) are.
31. As to step (b), it was submitted by Mr Rubin KC that the claim and cross-claim analogy was inappropriate in a situation where what was in play on one side of the equation was not a claim as such but an Order (following judgment) of the English Court which was prima facie immediately enforceable and upon which a party was seeking to rely and where, on the other side, there was a claim by way of action to enforce a foreign judgment which remained simply a claim until judgment was given in respect of it. While, if and once judgment was given on the latter, there could be a setting off of judgments (as discussed in *Fearn* at [37]), Mr Rubin KC submitted, that was not the present situation.
32. I agree. Hytera no longer has a competing claim for costs but is simply seeking to enforce, by way of stay, an Order already made in its favour. If the claim and cross claim analysis were to be applied in the present case as Mr Sprange KC for Motorola sought to do, it would mean that in any action where interim costs orders were made against a claimant bringing unsuccessful interlocutory applications, the claimant could simply rely upon its bona fide claim for a greater sum of damages in the action to prevent enforcement of any costs order.
33. I consider, further, that, in so far as it is a separate consideration, the functional test of a cross-claim which is so closely connected with the claim (here, on Motorola’s case, Hytera’s attempt to enforce the Costs Orders and the connection of that with the claim by Motorola in the US which has given rise to the Illinois Judgment which it seeks to convert into an English judgment in the Enforcement Proceedings) breaks down in the present case.
34. That test is directed at competing claims which arise out of a “close relationship between the dealings and transactions which gave rise to the respective claims”: see per Morris LJ in *Hanak v Green* [1958] 2 QB 9, analysing *Bankes v. Jarvis* [1903] 1 KB 549, at 24. While there may be a *connection* between the Freezing Order Application and the ultimate Enforcement Proceedings, it cannot be said that Motorola’s abortive Application has a close relationship with the transactions and dealings which gave rise to the claim before the Illinois Court and with the Illinois judgment debt now relied on as Motorola’s claim.
35. As to step (c), it cannot be said to be manifestly unjust or, in Mr Sprange KC’s words, “unconscionable”, for Hytera to rely upon the Costs Orders made by the Court of Appeal and the Supreme Court, either at all, or, *a fortiori*, in circumstances where no objection was made by Motorola to the making of those Orders or to the making of them in immediately enforceable terms on the now asserted ground of equitable set-off (or otherwise).

36. Motorola placed heavy reliance upon the decision in *Moorgate Industries UK Ltd v Mittal* [2020] EWHC 1550 (Ch).
37. I do not consider that decision of any assistance. The test of “so closely connected with [the claim] that it would be manifestly unjust to allow [the claimant] to enforce payment without taking into account the cross-claim” is a fact sensitive enquiry in each case. Care must therefore be exercised in praying in aid different cases on different “dealings and transactions”.
38. In *Moorgate*, there were two costs orders made by the Court going in different directions and one party sought to enforce its costs order, without reference to the other. As Judge Burton put it at [28], “the Claim and Cross-Claim are so closely connected that it would be manifestly unjust to require Moorgate to comply with its obligation to expend further sums, discharging the Costs Award when Mr Mittal continues, himself, to be in breach of the Commercial Court Order which required him to pay Moorgate’s costs within 14 days.” That is a very different case from the present. It is essentially closer to what followed from Picken J’s making of a costs order against Hytera on the service application and its effect on the sums due under the Costs Order from Motorola (see paragraph [16] above).
39. A further point of distinction, as Mr Rubin KC submitted, is that the case was essentially one where there were two judgments or costs orders and it therefore fell within that special class of set off analysed in *Fearns* at [37] (even if, as Mr Sprange KC correctly pointed out, Judge Burton treated the matter as one of simple equitable set-off of competing claims, perhaps based on the shape of counsel’s argument before her).
40. I therefore conclude that there is no equitable set-off which either defeats or in some way prevents Hytera seeking to enforce (by its application for a stay) the Costs Orders against Motorola.

Issue 2: Stay pending compliance with the Costs Orders

41. There was no issue between the Parties as to the general existence of the Court’s inherent jurisdiction to debar a party from engaging the process of the Court in proceedings while at the same time refusing or declining to comply with costs orders made by the Court against that party.
42. The principles governing the exercising of the jurisdiction and the important rationale which underlies the jurisdiction, i.e. of the Court protecting its own procedure and of the overriding objective under the CPR furthering the prompt and timely compliance with orders of the Court, including particularly, costs orders, have been emphatically stressed by the Court in various cases of which *Days Healthcare UK Ltd v Pihsiang Machinery* [2006] 4 All ER 233, cited above is one (see per Langley J. at [48]) and *Crystal Decisions (UK) Ltd v Vedatech* [2006] EWHC 3500 (Ch) is another (see per Patten J. at [9] to [11], particularly [11]).
43. Prima facie therefore the starting point would be that a party should not be permitted to bring or to continue with proceedings against another, where that party has refused or failed to comply with a costs order made against it and in the other party’s favour. Otherwise, that party would be receiving the benefit of the process of the Court while

at the same time cocking a snook at the Court in respect of orders with which it chooses not to comply. As Langley J. put it in *Days* (supra) at [48]:

“[It] would, indeed, be concerning if the court was unable to impose appropriate sanctions on those who choose to ignore its orders and yet continue to seek its process for their own ends.”

Picken J’s instinctive sympathy with the need for Motorola to have complied with the Costs Orders is unsurprising.

44. Motorola advanced three arguments against the ordering of the stay sought by Hytera.
45. The first was one, as I understood it, which went to the jurisdiction of the Court to make such an order in the present case, where (a) the Costs Orders were orders made by the Court in the Freezing Order Application; (b) the Enforcement Proceedings were separate and distinct proceedings and (c) there was not a perfect identity of party because in the Freezing Order Application in which the Costs Orders were made, other Defendants had been joined with Hytera by Motorola.
46. As it was put by Mr Sprange KC for Motorola in its Skeleton Argument at paragraph 44: “None of those cases [i.e. as cited above and other relied on by Hytera] are relevant for present purposes [...] HCC [Hytera] has not identified any authority which suggests that the court should stay a new set of proceedings on the basis that a previous set of proceedings remains unpaid.”
47. Approaching the matter as one of principle, the mischief at which the inherent jurisdiction is directed is the abuse of the Court’s process by a party who at one and the same time seeks to avail itself of the Court’s powers while refusing, when it suits it, to comply with the Court’s orders, when they go against it.
48. In my view there is no difference in principle between (a) the case of A bringing proceedings against B and being permitted to continue to prosecute those proceedings in circumstances where, in a procedural application in those proceedings, it has been unsuccessful and been ordered to pay costs to B, but refuses or declines to do so and (b) the case of A bringing proceedings against B where it is unsuccessful and is ordered to pay costs against B and then seeking to bring fresh proceedings against B without complying with the costs order made against it, at least where the two sets of proceedings are connected in some way or relate to the same subject matter or transaction between the parties.
49. In the present case, situation (b) exists but the proceedings are separate only in a formal and technical sense. The Freezing Order Application was made against, inter alios, Hytera in the context of prospective enforcement proceedings against Hytera which were then in fact commenced. It is a mere question of timing as to whether that Application was made after the commencement of the Enforcement Proceedings, in which case one would be in situation (a) or before them and in support of them when later made: situation (b).
50. The connection between and subject matter of the two sets of proceedings is such that they are essentially one for the purposes of the Court’s inherent jurisdiction. As Picken J. recorded Motorola’s argument (in the context of the valid service issue) at [2022]

EWHC 2887 (Comm) at [38]: “Implicit in their commencement [i.e. the Freezing Order Application proceedings], therefore, is the fact, and certainly the likelihood, that underlying enforcement proceedings would at some point be commenced.”

51. I was referred to two authorities.
52. Hytera relied upon the decision in *Investment Invoice Financing Ltd v Limehouse Board Mills Ltd* [2006] 1 WLR 985 as supporting the proposition that the inherent jurisdiction to stay proceedings for non-payment of costs orders extends to a situation where the costs orders were made in previous proceedings, where the proceedings relate to the same underlying subject matter. I agree.
53. The effect of that decision and the pragmatic test employed by the Court of Appeal in that case can be taken from the judgment of Moore-Bick LJ at [39]:

“[...] it is necessary to have regard to the considerations which underlie the court's approach to the commencement by the same person of a second set of proceedings while the costs of the first remain unpaid, as reflected in the authorities to which I have referred. In all the cases the court was moved to act by a sense that it would be unjust to allow a claimant whose action had failed for one reason or another in circumstances in which he had been ordered to pay the defendant's costs to put the defendant to the further expense of a second action until those costs had been paid. To pursue a second action in those circumstances can properly be regarded as an abuse of the court's process. In my view what matters is not the precise nature of the former proceedings but whether, having regard to the nature of those proceedings, their outcome and the claimant's failure to satisfy an order for costs against him, the second proceedings can be regarded as abusive”.
54. Any other test would represent a serious limitation on the Court's powers to control abuse and protect its process.
55. Motorola referred to the decision in *Moorgate Industries UK Ltd v Mittal* [2020] EWHC 1550 (Ch) where Judge Burton declined to hold that a second winding up petition could be stayed where the costs of the first had not been paid. It is very unclear what authority she was shown (see her essential conclusion that she would not so order because she had not been shown by counsel a case in which it had previously been done: [32]-[33]). That cannot militate against the clear and principled guidance given by the Court of Appeal in *Investment Invoice Financing*.
56. I therefore reject Motorola's first argument.
57. The second argument was that the Court should not exercise its discretion to grant a stay.
58. I disagree. None of the matters developed by Mr Sprange KC deflect from the fact that, once the set-off argument is disposed of, Motorola is simply in the position of any party which wants to invoke the process of the Court but without complying with the Court's costs orders at previous stages of the overall litigation. Given that, then some very good reason would need to be advanced to tilt the exercise of the discretion so far so as to allow Motorola to continue with its claim while in breach of the Costs Orders. As Patten J put it in *Crystal Decisions (UK) Ltd v Vedatech* [2006] EWHC 3500 (Ch) at [11]:

“I take the view that orders of the court, even in relation to interim costs, require to be complied with and that, unless there is some overwhelming consideration falling within Article 6 [ECHR] that compels the court to take a different view, the normal consequence of a failure to comply with such an order, is that the court, in order to protect its own procedure, should make compliance with that order a condition of the party in question being able to continue with the litigation.”

59. In my view, the most relevant discretionary considerations are, firstly, that Motorola is not being shut out of proceedings where it is in a defensive role (which may make a difference in certain cases: see *Days Healthcare UK Ltd v Pihsiang Machinery* [2006] 4 All ER 233 at [23]) but where it is the claimant invoking the Court’s process in an offensive role; secondly, that it is perfectly able to pay the costs if it wishes and there can be no prejudice to it doing so.
60. The matters relied on by Motorola are as follows.
61. (i) That Motorola has a judgment which once (and if) it is enforced Hytera may not satisfy. But that could be said in any case where a party, having lost an application and been ordered to pay costs forthwith, argues that it has a very good claim which if proved, may subsequently go unsatisfied. Such considerations cannot control compliance with costs orders in complex litigation. As Hytera submits, the normal and sensible practice of the Courts, particularly in complex cross-border litigation, is based on the principle of “pay as you go”: see *Michael Wilson & Partners Ltd v Sinclair* [2017] 1 WLR 3069 at [42] per McCombe LJ. This aspect also sits uncomfortably with the dismissal by the Court of Appeal of Motorola’s separate Freezing Order Application which might be expected to deal with such concerns, if legitimate.
62. (ii) That Hytera has other means open to it to enforce the Costs Orders by execution against assets. While that in certain cases might be relevant, as explained in *Crystal Decisions (UK) Ltd v Vedatech* (supra at [10]), it will rarely be a factor of weight, given that it is unacceptable in principle for a party seeking the Court’s powers to refuse to comply with its orders and contrary to the overriding objective to oblige the party holding the costs order in its favour to have to engage in (contested) enforcement measures.
63. (iii) That Motorola has not flagrantly disobeyed the Court’s Costs Orders because it has offered to pay into Court. That to my mind is a strange way of looking at compliance with the Costs Orders which clearly require direct payment and which until and unless varied are being breached *de die in diem* while Motorola refuses to pay, save on its own terms, which terms were not sought before the Court of Appeal or the Supreme Court when the Costs Orders were being made. On any view, there has been deliberate and considered non-compliance, whether it deserves the epithet ‘flagrant’ is beside the point.
64. (iv) Lastly, that Hytera will not suffer prejudice by Motorola not complying with the Costs Orders and continuing with the Enforcement Proceedings as the situation will sort itself out one way or another on the conclusion of the Enforcement Proceedings. This submission is little short of offensive in circumstances where one is considering non-compliance by Motorola with orders of the Court and the public policy consideration of the need for the Court’s orders to be fully and loyally respected, quite apart from Hytera’s interest in having the Orders complied with.

Conclusions on Hytera's application for a stay

65. This is a clear case for the exercise of the Court's powers to stay the Enforcement Proceedings pending Motorola's compliance with the Costs Orders. Hytera's application succeeds.

Issue (3): Payment into Court?

66. Motorola, having offered to pay the sums under the Costs Orders, as reduced by the costs order made by Picken J., into court and Hytera having refused to accept this, seeks an order that if the Costs Orders are not as such stayed, nevertheless the monies should be paid into Court to await the result of the Enforcement Proceedings.
67. Essentially the ground relied upon is² that if Motorola wins the Enforcement Proceedings then it may or will have difficulties in obtaining the repayment of those monies from Hytera. Various factual matters are raised (see Motorola's Skeleton Argument at paragraph 63) which are disputed or not accepted and on which the Court cannot at this stage take any concluded view.
68. However, in my view, that is a ground which (if of any weight) could and should have been raised before the Court of Appeal and the Supreme Court and it is far too late to raise it now, in answer to the present application by Hytera.
69. The Court is being asked to vary the Costs Orders of the Court of Appeal and the Supreme Court. Even if the Court had jurisdiction to do so under CPR3.1(7), which I doubt, in the exercise of my discretion it would be wholly inappropriate to do so over a year after the Orders were made and where no application was made to the Courts making the original Costs Orders: see the considerations raised in *Tibbles v SIG plc* [2012] 1 WLR 2591 in the specific context of varying costs orders at [39]. Further, the application is essentially one to allow Motorola not to comply with the Costs Orders originally made in accordance with their terms and where there has been and is no good reason for that non-compliance.
70. It was submitted by Mr Sprange KC that Motorola was not seeking to vary those Orders, but only seeking to attach a condition upon the order made in Hytera's favour to stay the Enforcement Proceedings. Reference was made to CPR 3.1(3)(a) which provides "When the court makes an order, it may: (a) make it subject to conditions, including a condition to pay a sum of money into court".
71. I do not consider that this addresses the issue. The typical case of the exercise of the Court's power under this Rule is to require a party seeking relief to pay in as a condition of obtaining the relief. That is not this case. The present case is one where Motorola seeks after the event to vary the effect of Costs Orders which require it to make direct payment. For the reasons given above, I consider it inappropriate to do so.

Conclusions on Motorola's cross-application

72. I therefore dismiss Motorola's cross-application.