Neutral Citation number: [2024] EWHC 982 (Comm)

Case No: CC-2023-BHM-000041

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KBD)

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street, Birmingham B4 6DS

Date: 26 April 2024

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

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Between :

Starting Point Recruitment Limited	**Claimant**
- and -	
Walsall Metropolitan Borough Council	**Defendant**

- -
- -

Steven Reed and **Harry Samuels** (instructed by **Talbots**) for the **Claimant**
Nigel Giffin KC and **Shabbir Lakha** (instructed by **the Defendant's Legal Department**) for the **Defendant**

Hearing date: 24 April 2024

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ WORSTER

HHJ WORSTER :

Background

1. This is an application for security for costs made by the Defendant by an application notice dated 2 April 2024 and served the next day. It is supported by the witness statement of the Defendant's solicitor Mr Javed of the same date. The application is

resisted. The Claimant relies upon the witness statement of Mr Naish of 19 April 2024. Mr Naish is a Director of the Claimant company, and its Chief Financial Officer.

2. For approximately twenty years, the Claimant has provided the Defendant with temporary workers. Some were engaged in relatively specialist work. The parties entered into what have been called framework agreements which made provision for the basis of their relationship. The latest of those agreements included terms which provide for the confidentiality of certain information, non-solicitation and (on the Claimant's case) that the parties would act in good faith in their dealings with each other. The Claimant also relies upon the nature of the relationship between the parties in support of its further and alternative case that this was a relational contract, and one where there was an implied term that each would act in good faith in their dealings with each other.

3. The Defendant was responsible for the bulk of the business the Claimant did, and the Claimant traded profitably. Mr Javed summarises the position from published accounts at paragraphs 12 and following of his witness statement. He uses round figures:

Year to	Turnover	Profit
31.3.21	£12M	£600,000
31.3.22	£13.3M	£800,00
31.3.23	£15.7M	£1M

Mr Javed's evidence is that the Defendant spent £12.2M with the Claimant in the year to 31 March 2022 and £14.3M in the year to 31 March 2023, and that the spend in the first six months of the year commencing 1 April 2023 continued at much the same rate.

4. In about April 2023 the Defendant decided that it did not intend to extend the agreement it had with the Claimant, which expired at the end of September 2023. It decided to source its temporary workers from a new provider, Opus People Solutions Limited ("Opus"). The Claimant's case is that the Defendant informed it of that decision in late July 2023; see paragraph 19 of the Particulars of Claim, and invited the Claimant to become a "second tier" supplier to Opus. The Claimant and Opus were unable to reach an agreement about that.

5. On 28 July 2023 the Defenant asked the Claimant to provide it with a detailed spreadsheet with information about the agency workers the Claimant had placed with it. The Claimant's case is that this was provided, and included information which was confidential. It alleges that the Defendant then used this information

> *... to advise, assist, direct and encourage [the Claimant's] agency workers to terminate their agreements and/or engagements with [the Claimant] and/or in order to directly or indirectly solicit the engagement and employment of workers supplied to the [Defendant] by or via [the Claimant] so that the agency workers would continue to supply services to the [Defendant] via Opus.*

In other words, to poach the Claimant's workers – to encourage them to leave the Claimant and join Opus. There are other aspects to the claim, but that is the essence of it. The loss to the Claimant has yet to be quantified, but of the 281 workers placed with the Defendant by the Claimant, some 200 ended their allegiance to the Claimant and (presumably) moved to Opus, retaining their work with the Defendant.

6. The Defendant disputes that it has received or used the spreadsheet as the Claimant alleges. It also disputes the Claimant's case that the information on the spreadsheet is confidential, whether as defined by the agreement between the parties, or on the basis that it is "manifestly confidential". But it accepts that there is an arguable case. Indeed, the Court has previously found that there is a serious issue to be tried. On 27 September 2023 the Claimant applied for an interim injunction to prevent the Defendant from using the Claimant's confidential information for the purpose of engaging its workers directly or indirectly. HHJ Williams made orders without notice and on the return date on 6 October 2023, that the Defendant should not use, publish, communicate or disclose the information set out in the Schedule to that Order (essentially the information the Claimant says was on the spreadsheet) in order to directly or indirectly solicit the engagement or employment of workers supplied to the Defendant by or via the Claimant.

7. It is said by the Claimant that HHJ Williams indicated by his comments during the hearing of that injunction, that it had very good prospects of success, and that it may wish to consider an application for summary judgment in the light of the Defendant's blatant breaches; see Naish paragraph 9. The Defendant does not accept that the Judge made comment to that effect. The merits of the claim can be relevant to the consideration of an application for security if they are clear, but the court is discouraged from undertaking a detailed review; see paragraph 4 of Appendix 10 of the Commercial Court Guide. This is not a case where I can properly take account of the strength or otherwise of the claim. Mr Giffin KC accepts that there is an arguable case. He submits that it is very weak, but does not seek to persuade me that I should take the merits into account. In their skeleton argument, Mr Reed and Mr Samuels refer to the merits and invite me to take them into account. But the point is not sufficiently clear. If it were, then I might have expected the Claimant to have applied for summary judgment before now.

The application

8. The argument I heard dealt principally with two aspects of the test for security for costs. The relevant provisions of CPR Part 25.13 are these:

> *(1) The Court may make an order for security for costs under rule 25.12 if –*
>
> *(a) it is satisfied that having regard to all the circumstances of the case, that it is just to make such an order; and*
>
> *(b) (i) one of the conditions in paragraph (2) applies; …*
>
> *(2) (c) the claimant is a company … and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;*

9. The first question is whether the Defendant can show that there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so. The notes in the White Book at Part 25.13 refer to that as a "gateway". In other words, if that is not established, no order for security will be made. However, if that gateway requirement is established, the Court then has a discretion as to whether to make an order, the amount of security to order, and the manner in which and time within which it is to be given.

10. I begin with the gateway provision. The Claimant is a company. It is wholly owned by a charity (limited by guarantee) called Steps to Work ("STW"). In the past the Claimant has remitted its profits to STW by way of dividends and other means. I was told by Mr

Samuels (on instruction) that three of the Claimant's Directors are Directors of the charity (of a board of thirteen). There is no direct evidence of that, but I understand that those instructions were taken from the publicly available returns.

11. The Claimant accepts that at the present time, it would be unable to pay the Defendant's costs were it ordered to do so. The parties agree however, that the test requires the Court to consider the position when such a liability is likely to arise. Mr Giffin KC suggested that in reality that meant in about 12 months time. The trial is in February/March 2025, judgment would probably be reserved, and there would be an order for costs on or not long after handing down. A payment on account would be ordered. There would be an issue in relation to incurred costs, but a proportion would be payable on account, and a substantial proportion (up to 90%) of the budgeted costs would also be payable. There would normally be some time to pay allowed, so that it may be that it will be a little longer than 12 months. If it were 15 months, that would take the date to July 2025.

12. The test is whether there is reason to believe that the Claimant "*will"* be unable to pay the Defendant's costs, not "*may*" be unable to pay.

13. The Claimant has little in the way of fixed assets. Its worth comes from its ability to trade profitably. Mr Samuels submitted that the Defendant's evidence on this point was no more than supposition and innuendo. He submitted that the burden was on the Defendant to establish that this gateway provision was satisfied, and that Mr Javed's evidence fell well short of doing that. All it had done was look at the publicly available accounts and assume that because the Claimant had lost the Defenant's business, it would be unable to meet a costs order in 2025. It is right to say that the burden of establishing this gateway is on the Defendant, but the Court is not limited to the evidence provided by the Defendant. It will often be the case that the Defendant has limited access to the detail of the Claimant's financial position. Indeed Mr Javed accepts that the Defendant does not know what the Claimant has done since the end of its business with the Defendant to "mitigate its loss". In the normal course, the Claimant will put in evidence of its financial position, as it has done in this case, and the Court will go on to consider the issue on the basis of all the evidence it has.

14. The approach of the Court is confirmed by Lady Justice Arden (as she then was) in her judgment in *Jirehouse Capital v Beller* [2008] EWCA Civ 908 at [34]:

> *As Sir Donald Nicholls V-C held in the Unisoft case [1993] BCLC 532, the court has to look at the evidence put forward on the application as a whole and form an assessment on the basis of the evidence as a whole as to whether there is reason to believe that the company will not be able to pay costs ordered against it. Thus the jurisdiction is not triggered, as counsel sought to persuade Sir Donald Nicholls V-C in the Unisoft case, simply by the evidence of one party only. It is open to the company to rebut the evidence of the applicant for security. As Sir Donald Nicholls V-C said in the Unisoft case, at p 534, the court "will not let common sense fly out of the window."*

Reason to believe

15, In opening his application, Mr Giffin KC made three points which he submitted should lead the Court to conclude that there is reason to believe that the Claimant will be unable to pay an order for the Defendant's costs. Firstly that the Claimant cannot currently pay such an order. That is accepted. Secondly that the prospect of a marked improvement in the Claimant's financial position over the next 12 months is no more

than speculation. Thirdly that even on the Claimant's optimistic forecast, it is not able to meet its own costs bill, let alone the Defendant's.

16. The focus, in the event, was on the Claimant's evidence as to its financial position. Mr Naish's witness statement was filed on 19 April 2024. I granted the Claimant permission to rely upon that evidence at the hearing of the CCMC on 22 April 2024. There were good reasons for the delay in the filing of the evidence, and it seemed to me that it would be wrong to deal with such an application without considering it. The application itself had been made relatively late in the day, some seven months after proceedings began, and after the CCMC had been listed. That is despite the fact that the Defendant must have known the basis for its application well before it first raised the issue in correspondence on 20 March 2024.

17. Mr Naish is the Chief Financial Officer of the Claimant. On the face of it, he is best placed to give the Court evidence of the financial position of the Claimant, and of its future prospects. His evidence is that the Defendant's breaches have had a serious impact on the Claimant's finances. At paragraph 13 of his witness statement he refers to the loss of £7.6M in revenue. As I read that evidence, that is not the revenue lost from the termination of the agreement with the Defendant, but the loss of revenue caused by the breaches alleged by the Claimant. There is no detail to explain how that sum is arrived at, and as matters stand, the Claimant's position is that it has yet to calculate its loss. But this provides some evidence as to the level of the loss of revenue said to be caused by the Defendant's breaches.

18. Mr Naish then sets out what the Claimant has done to retrieve its financial position. It has improved its gross and net margins by negotiating improved rates for its temporary workers. A service for permanent recruitment has been introduced and is expected to generate an additional £1.1M in turnover. Staff salaries and operating costs have been cut by 25%, and an office has been opened in Birmingham to attract new workers.

19. The Claimant's case is that it has lost 200 or so workers from its books as a result of the Defendant's alleged breaches, and those workers are no longer available to the Claimant to place. At paragraph 16 of his witness statement Mr Naish says that the Claimant is building its bank of temporary and permanent workers, and has hired a new Chief Executive to assist in introducing new areas to the business. He exhibits documents which illustrate the areas in which the Claimant is recruiting, and identifies customers to whom it is currently supplying workers. The evidence is general in nature, although I have no reason to doubt it.

20. At the heart of Mr Naish's evidence is a forecast for the period March 2024 to March 2025. The figures in this document from April 2023 (the beginning of its last tax year) to the end of January 2024 are actual, and the figures after that are forecasts. This is a detailed document. The information is grouped into Income, Direct costs, Overheads and at the bottom gives a Pre tax profit or loss. This is all done on a month by month basis. The groupings I refer to are then all broken down into individual items, so that the source of the income is identified, likewise the direct costs and the overheads are identified on a line by line basis. This does not have the appearance of a document got up for the purposes of this application, but appears to me to be a document which the Claimant is using in the course of its financial management. The actual figures show a dramatic loss of income on a monthly basis at the end of September 2023. A monthly income of £1.1M to £1.5M in round terms, reduces by January 2024 to £64K. It is then forecast to increase. Initially in a modest way to £82K in March and April 2024, but then to begin to increase markedly, rising to £113K in May, £166K in June, £206K in

July, £303K in August and then to figures between £400K and £550K in the months from November 20224 to March 2025.

21. This spreadsheet shows that the company is currently loss making, losing over £400K in the four months from October 2023 to January 2024. Indeed Mr Giffin KC points out that it made a small loss in the September of 2023. However, the forecast for the year end 31 March 2025 is an income of £3.8M, giving a pre tax profit of £591K. This is, obviously, dependent upon the Claimant getting in the work to generate the income figures it forecasts. The costs are likely to be easier to estimate from past experience, but it is these income figures which lead Mr Giffin KC to submit that the forecast is based on speculation.

22. Any forecast carries with it a degree of uncertainty. This forecast is drawn up in the aftermath of the loss of the Claimant's major income stream, and so is bound to be open to attack. There is little in the way of actual figures to work from. There is no "trend" to extrapolate. It is an internal document, rather than one prepared by an auditor or some independent person (such as a lender). But Mr Naish's evidence is not to be ignored. He has produced a detailed document, and given evidence of the practical steps which lie behind the assumptions he has made. This is not an exercise in round figures on the back of an envelope, but a document which suggests that the Claimant is serious about replacing the business it has lost and trading the company out of its difficulties. Mr Samuels reminds me that Mr Naish has signed a statement of truth.

23. At paragraph 22 of his witness statement Mr Naish gives evidence of a series of tenders the Claimant has made for further work which are not accounted for in the forecast. The table he provides details of 10 tenders, the first tendered for in November, but the bulk in March and April this year. None have been rejected, and the result of a good many of them is expected in the next two months. Some are for substantial amounts of money – five of the ten are for a turnover of £5M pa or more. If only one of those tenders were successful, that would increase the Claimant's income dramatically.

24. The fact that these tenders are not included in the forecast is, in a small way, a mark of the Claimant's approach to this matter. My assessment of this forecast is that, for all that it may show a substantial growth in income with the uncertainties I have summarised, it is a serious attempt to forecast this company's future. As I say, it has the hallmarks of a document produced for the purposes of financial management. The absence of tenders for work not yet achieved supports that view.

25. The forecast does not make provision for the future costs of this litigation. The line for Professional Fees from September 2023 to January 2024 is consistent with significant sums being spent on this litigation. The usual spend was in the single figure thousands. In September 2023 it was £26,352, in October £17,727, in November £28,193, in December £7,957 and in January 2024 £41,398. There will have been other such expenses. Taking on a new office would be one, and I was told by Mr Samuels on instruction that STW had paid one bill for the Claimant. But the actual figures on the spreadsheet are consistent with the Claimant paying for the bulk of this litigation to date. The point Mr Giffin KC makes is that the forecast for future expenditure on Professional Fees is for £3,000 per month. That plainly does not include the costs of this case. In its letter of 20 March 2024 the Defendant asked how the Claimant was paying for the litigation. That issue was not expressly dealt with in the Claimant's letter in response of 22 March 2024 or in Mr Naish's witness statement, but it is reasonably apparent from the information I now have.

26. Mr Giffin KC does not say that this forecast is dishonest or that Mr Naish does not believe it to be correct. His point is that it is speculative. My view is that the forecast is a reasonably reliable piece of evidence. It may prove to be an overstatement of the Claimant's position, but if any of the more substantial tenders for work succeed, it may prove to be an understatement. I intend to proceed on the basis that it will be there or thereabouts. Which takes me to Mr Giffin KC's third point. Absent funding for the Claimant's future legal costs from some other source, the profit before tax will not be sufficient to meet the Claimant's costs, let alone the Defendant's. There is no evidence as to how the Claimant will pay its own costs. On instruction I was told that the Claimant is considering some form of insurance. It was not suggested that STW would be funding them – indeed the evidence suggests the contrary.

27. The Court should not be over critical of a failure to deal with specific points in the evidence. I take account of the fact that the Claimant is currently in a difficult financial position. On the one hand it has brought this claim in the knowledge that it will be expensive, and has to plan for funding. On the other, it has been taking substantial and active steps to replace the workers lost to Opus, and the business it lost when the agreement with the Defendant came to an end. This application was made late in the day, at a time when the Claimant was busy preparing for a listed CCMC. It had little advanced notice, and replied promptly to the letter the Defendant sent on 20 March 2024.

28. However, whilst accepting the Claimant's forecast as a basis for my evaluation, there is force in Mr Giffin KC's third point. The forecast does not show a profit which is sufficient to meet the costs of these proceedings. I have conclude that on the evidence I have there is reason to believe that the Claimant will be unable to pay the Defendant's costs in 12 to 15 months time. That is by no means certain. The recovery may exceed expectations. If the Claimant's costs are covered in some other way then there would be a fund available which would meet a substantial proportion of those costs. But on the evidence I have the gateway requirement is met.

29. Mr Samuels submitted that there was enough to meet the order for security which the Defendant sought on this application, being some £250,000 to cover the costs up to witness statements. That is correct, but it is not the question I have to determine. The Defendant's costs will exceed £600,000, as will the Claimant's.

Discretion

30. CPR Part 25.13 frames the Court's discretion in wide terms. It is to be satisfied that having regard to all the circumstances of the case, it is just to make such an order. In this case there are two matters in particular which the Claimant relies upon. The first is that to make an order now will stifle the claim. The second is that the Claimant's impecuniosity has been brought about or contributed to by the Defendant's breaches. There is substance in both of those points.

31. Both parties took me to the commentary in the White Book on the issue of stifling at 25.13.1.1. The proposition is that if the effect of an order for security would be to prevent the respondent to the application from continuing its claim, then security should not be ordered; see *Goldtrail Travel v Onur Air Tasimaclik* [2017] UKSC 57 per Lord Wilson at [12].

32. The burden is on the respondent to show, on the balance of probabilities, that the effect of an order would be to stifle the claim. Lord Wilson says this in *Goldtrail* at [16]:

> *... for all practical purposes, courts can proceed on the basis that, were it to be established that it would probably stifle the appeal, the condition should not be imposed.*

For appeal in this case, read claim.

33. It is plain that if I was to make an order security in any substantial sum today, the Claimant would not be able to pay it. However, it is for the Claimant to demonstrate not only that it is unable to pay, but that it cannot raise the funds from some other source. Lord Wilson frames he criterion in the following way in *Goldtrail* at [23]:

> *Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to meet the requested condition.*

Lord Wilson recognised that whilst that criterion is simple, its application is likely to be far from simple.

34. The respondent to such an application needs to provide full and frank evidence on the point. In *Goldtrail* at [24] Lord Wilson makes it plain that the Court should not take the respondent's denial that funds are available at face value. It is to judge the probable availability of funds by reference to the underlying realities of the company's position, and all aspects of the relationship with its owner, including the extent to which the owner is directing its affairs and supporting it in financial terms.

35. Mr Giffin KC submits that there has been a failure to make the full and frank disclosure required. His position might be seen as supported by the need to answer the question I posed at the end of the Claimant's submissions about who had funded the Claimant's costs. He draws attention to the fact that STW owns the Claimant, and that it has in the past benefitted considerably from its trading. He referred me to the line for "Intercompany Creditors" on the spreadsheet Mr Naish produced at page 10 of his exhibit showing the capital position of the Claimant, as is and as forecast. He submitted that this demonstrated that it was STW which was supporting the Claimant. However, that is not what the spreadsheet shows. Indeed, it appears to show that the support from STW is reducing. It was at a constant figure of £650,591 from April 2023 to January 2024, when it began to fall. The April figure (as forecast) is £272,018.

36. On the one hand it might be said that the failure to explain the position in detail shows a lack of full and frank disclosure on the point. On the other hand I have already noted that the Claimant has had to respond to this application at speed, and that there is a limit to the detail to be expected. Mr Giffin KC's point that there is nothing about the money which might be released by factoring is an example of that. Given the state of the Claimant's income it seems improbable to say the least, that a factor would be prepared to advance the sort of sums the Defendant seeks. The trade debtors are falling month on month at the moment; from over £1M in September 2023 to a forecast figure of £124K in April 2024. Further, in reply, Mr Reed made the point that the position as to future funding is a matter which is being considered. There is nothing to disclose yet.

37. What I have is the following evidence from Mr Naish:

> *29. Although the Claimant's current position is temporary, and will have stabilised into profitability by June 2024, the Claimant has nonetheless sought a guarantee from its parent company, Steps to Work, but Steps to Work is a registered charity which will have its own hurdles before it can guarantee the liabilities of a*

commercial entity. The Claimant therefore simply has no recourse to any other sources of funding to provide the significant security asked for.

38. Whilst there could be greater detail given about what the Claimant has done, Mr Naish says in terms that the Claimant company has no recourse to other funds. There is nothing from STW to confirm that, but I am not persuaded that corroborative evidence is needed. STW are a charity, and there will be "hurdles" for it to overcome before it can offer a guarantee for the Defendant's costs. This is not the usual parent/subsidiary situation where a purely commercial decision can be made. The Claimant's evidence may not make me sure, but it is sufficient to satisfy me on a balance of probability that there are no other funds that will be available to the Claimant to meet an order for security were I to make one on this application. Consequently the stifling argument succeeds.

39. The second matter the Claimant relies upon in support of its case that I should exercise my discretion in its favour and refuse the application, is that its current financial position has been caused by the conduct of the Defendant as alleged in the Particulars of Claim. It is important here not to attribute the entirely of the Claimant's current impecuniosity to that conduct. The loss of 200 or so workers from the books is, on the face of it, a significant blow to a business which relies upon providing temporary workers. That is a different loss to the loss of the Defendant's business. What the Claimant is saying in simple terms, is that its ability to replace that business has been damaged and delayed. It is not possible at this stage to quantify what that loss is, although I have already noted Mr Naish's reference to a loss of income of £7.6M.

40. It is not necessary for the Claimant to have clear prospects of success for the court to have regard to this matter as one of the circumstances of the case; see Vos J as he was in *Mastermailer Stationery Ltd v Sandison & Ors* [2011] EWHC 4304 (Ch) at [28]-[31].

41. It is, however, only one matter to have regard to when considering whether or not to grant security. Mr Giffin KC drew my attention to the general principle underlying the grant of security for costs. It is that the interests of justice are ordinarily best served if successful litigants recoup the costs of their litigation, or the bulk of those costs, and unsuccessful litigants pay them; there being a real difference between the position of claimants, for whom issuing proceedings is always a voluntary act, and defendants for whom being sued is not; see the commentary in the White Book at 25.13.1. The fact that there is reason to believe that the Claimant will be unable to meet such an order for costs is, if the Claimant's case is right, at least in part due to the Defendant's conduct. That is a matter which tends to negate or at least to weaken the force of the rationale for the rule to which Mr Giffin KC refers. On the facts of this case, it is a material factor and weighs in the balance against the grant of an order.

42. Having regard to the circumstances of this case, it would not be just to make an order for security.

Disposal

43. The application for security for costs is refused. The judgment will be emailed to the parties, and is to be treated as handed down without the need for further attendance at 10.30 on Friday 26 April 2024. The draft directions from the CCMC are to be submitted for approval as soon as possible.

44. As to the costs of this application, my provisional view is that they should follow the event and that the Defendant should pay them. If there is an issue as to the principle or assessment of those costs I would be prepared to determine the matter on paper to save the expense of a further hearing. The Defendant can set out its objections in writing in the next few days and the Claimant may then respond. Those submissions should be brief. May I thank Counsel for their assistance.