

Mr. Ayoub-Farid Michel Saab, Mr. Fadi Michel Saab v Dangate Consulting Ltd., Barrington London Limited, Mr. Nigel Brown, Mr. Alec Leighton



No Substantial Judicial Treatment

Court

Queen's Bench Division (Commercial Court)

Judgment Date

25 July 2019

Case No: CL-2016-000195

High Court of Justice Queen's Bench Division Commercial Court

[2019] EWHC 2602 (Comm), 2019 WL 06349578

Before: Mrs Justice Cockerill

Date: 25 July 2019

Hearing dates: 25th July 2019

Representation

David Allen QC and Jason Robinson for the Claimants.
Steven Kay QC for the Defendants.

Approved Ruling

Thursday, 25th July 2019

Mrs Justice Cockerill

1. So I have in front of me a draft order, and although I have had some quite detailed submissions from Mr Allen and Mr Kay in relation to points at issue, they actually have relatively little impact on the order, so I'm going to just deal with the points that matter as such.

2. Essentially, there are three substantial points that go to the order. The first is the question of whether there should be an affidavit or a witness statement provided for in the order. Mr Kay, on behalf of the defendant, says that there is no need for an affidavit, and that it should be a witness statement. Mr Allen naturally says the opposite.

3. It can't quite be said that this is a distinction without a difference because there is a difference. Mr Allen says that that difference is not insignificant, and that is the jurat aspect of an affidavit. Mr Kay says that having an affidavit in this sort

of proceeding would be unusual; it is normal in the context of civil court proceedings, these days, to simply serve a witness statement.

4. I am persuaded that it is appropriate in this case for the information to be provided by way of affidavit. There are essentially two reasons for this. The first is that a witness statement is perhaps more apt in the context of ongoing proceedings where a witness may subsequently be anticipated to be called to give evidence. These are proceedings which are reaching their final stages and we are simply dealing with the enforcement aspect of them.

5. The second is that I do think that there is force in the context of proceedings where, although I have certainly not found the defendants to be dishonest, I have found that the defendants have breached a very, very clearly worded agreement, which they signed, that there should be absolute clarity to the defendants; it is important that they comply and that they give full information. And so in those circumstances, where there is this small but not insignificant difference between a witness statement and an affidavit, it seems to me appropriate for those essentially two reasons that the evidence be given in the form of affidavit. I would add that it is not uncommon at all in this court for material to be provided in analogous situations by way of affidavit. For example, in relation to freezing injunctions and so forth, where important information is to be given in highly contentious proceedings, it is still often done, although we are all aware that the hope under the [CPR](#) was that affidavits could slip away somewhat.

6. The second issue is as regards the question of whether the order should be endorsed with a penal notice. Mr Allen submits that the order should be. Mr Kay says that it would be inappropriate and excessive for the order to be endorsed with a penal notice. He says that there need to be grounds for making a penal notice on an order, and that putting a penal notice on an order is a serious matter which affects the Defendants' rights.

7. It is also submitted that it is an extreme measure which is not based on any meritorious grounds, given that the defendants have not breached any court orders, nor have they shown any intention of so doing. Again, it is said that it would not be appropriate to do so in circumstances where I have not found the defendants to be dishonest.

8. I am not going to accede to Mr Kay's submissions on this. I am going to say that it is appropriate for this order to be endorsed with a penal notice. I believe that there may be some misunderstanding as to the nature of a penal notice. A penal notice does not affect the defendant's rights, it does not affect the defendant's reputation, it is not any reflection on the defendant himself at all. The purpose of a penal notice, as is quite clear in the authorities which have been cited in the claimant's skeleton, is to give a warning, as I said in the course of argument, a clear "shot across the bows" to ensure that the recipient of the order is absolutely clear in their mind as to the importance of compliance with the order, and the potential consequences of a breach

9. There are two quotes which have been put into paragraph 31 of the Claimant's skeleton, one from [Bell v Tuohy \[2002\] 1 WLR 2703](#), [53] per Neuberger J, as he then was, which says:

"The purpose of giving notice in writing to a defendant to the effect that his failure to comply with the court order could lead to his being sent to prison is to bring home to him the terms of the court order and the seriousness of his failing to comply with that order and to give him a proper opportunity to consider his position, to take advice and to make appropriate arrangements".

10. The second is from the *Masri litigation*, [2011] EWHC 409 by Gloster J, as she then was, where she says that:

"The function of the penal notice is to warn the particular officer of the body corporate that disobedience to the order would be a contempt of court which may be punished by the imprisonment of any individual responsible".

11. It seems to me that this is plainly litigation which has raised high temperatures. It is plainly litigation where, if there is non-compliance, the claimants may well wish to consider contempt proceedings. Were they to do so, any order would have to be endorsed with a penal notice before any contempt proceedings could be begun to be applied for. In those circumstances, if I do not put a penal notice on the order and there is any non-compliance, it would lead to an unnecessary round of coming to the court simply to have the order reissued with a penal notice endorsed on it.

12. Given that there is no actual substantive requirement within the penal notice, its only purpose, effectively, being to give that warning to which I have alluded, it seems to me that in circumstances where this is an order which requires clear compliance with certain steps it is appropriate that that penal order be put on the order now. And I say again that this is far from being unusual in cases such as this; it is something which is done in very, very many injunction cases. In the Interim Applications Court, Court 37 it seems that most orders have penal notices on them. It is absolutely routine, for example in relation to freezing orders, and it is often done in relation to delivery up orders. So the Defendant should take it as no personal reflection on them, but they should take it as it is. It - has been explained as a clear warning as to the territory which this order occupies, and what would be likely to be the next steps were compliance not to follow.

13. The third substantive issue in relation to the order is the question of the Defendants retaining the documents for the purposes of the Cyprus proceedings. Again, despite Mr Kay's best attempts I am not going to accede to the application in this regard; So far as concerns the Cyprus proceedings, quite aside from the point which Mr Allen makes about disclosure – one point is that the substance of them could have been brought here. Then those are proceedings which, if there are requirements for any documents, those requirements are perfectly capable of being dealt with within those Cyprus proceedings. I have been given no grounds and no evidence to suppose that the Cyprus courts, which are, of course, sophisticated courts, do not have a process for documentary disclosure, such that it would be necessary for documents from these proceedings to be retained in order to be deployed in those proceedings.

14. Even if that were the case, given that the ambit of the discussion in the Cyprus case is a narrow one, it would have required, for example, evidence as to why all the documents in these proceedings would need to be retained, particularly in circumstances where certain documents in these proceedings will inevitably have come into the public domain, for example So given the fact that there are Cyprus proceedings with their own centre of gravity and their own procedures, and the need to focus in any event on what would be needed for them to proceed and the absence of anything in relation to that, I remain completely unpersuaded that there should be any alteration of the order to reflect the needs of the Cyprus proceedings.

15. That then brings me to the question of costs. The parties have agreed that it is appropriate that I summarily assess the costs of these proceedings. Although those costs are quite large and summary assessment is perhaps unusual, I agree that it is the appropriate way to go in this case. So far as the principle of costs is concerned, Mr Kay has addressed me on the question of whether the claimants should, despite the fact that they won overall, be entitled to their costs on a large, given that there were, for example, elements such as the media allegations and the £100,000 payment aspect on which the claimants

were not successful Bearing in mind also that the defendants have delivered everything up, they say, well before, and that they took a very reasonable approach to such matters as, for example, the late appearance of the *Prince Jefri* point, and that bearing in mind the fact that I did find, at paragraph 176 of the judgment, that had the matter been more focused and had the disclosures been more focused, it was potentially possible that there might have been a public interest defence (though, in fact, there was not, on the facts before me).

16. Despite those submissions, I am not persuaded that it would be appropriate to do anything other than follow the normal course in civil proceedings, which is that costs follow the event.

17. There are cases where, for example, there is a large issue, on which a large proportion of the litigation costs generally have been spent, which has not succeeded and where it is then appropriate either to make an issue-based costs order to make a percentage-based deduction from the overall costs. That is not this case. There is no element such as that on which the claimants have not succeeded which would make it appropriate for some change from the normal "costs follow the event" decision.

18. The aspect of the media claims was perhaps a large element within the trial, but it was not, itself, a large aspect within the litigation as a whole or certainly that is not the way that the case has been put before me this morning in relation to costs, so that one could look at the overall costs and say that a large proportion must go with that.

19. So in relation to costs overall, the appropriate answer is that costs follow the event and that the claimants are entitled to their costs. The fact that the defendants are impecunious or may be impecunious (I have evidence only in relation to the position of Mr Brown), is not a matter which can make a difference to that decision.

20. This is a piece of litigation which was hard fought and was not compromised. The Defendants pursued their claim, both in relation to public interest defence and compulsion by law, to trial, and the normal costs consequences must follow.

21. When I turn to the summary assessment, in relation to the budgeted costs I have to have regard to the budgeted costs which were approved following a very careful exercise to which I have been referred by Carr J. There is, indeed, recent authority which says that I would need some good reason in relation to budgeted costs in an approved budget for departing from them. No such reason has been put forward in relation to any of the heads of costs before me this morning. Having looked at the costs independently, given the relatively small total given the size of the litigation and the length of the trial, it would have surprised me if such a submission could successfully have been made. So in relation to budgeted costs I'm making no deduction.

22. The only matter which remains is as regards incurred costs; that is, the costs which had already been incurred at the time the cost budgeting decision was made. That is a figure of approximately, I think, £116,000. I have heard submissions in relation to that. I obviously have a discretion to reduce that, given that that was not an approved figure per se, and Mr Allen has warned me to be careful of double counting, given that Carr J said that she was going to take into account the fact that there were incurred costs when making her assessment.

23. Looking at the figures in the round and bearing in mind everything that has been said about the large amount of work which was done beforehand, and the fact that all the pleadings were effectively complete by the time that the case management conference happened, it seems to me that it would be inappropriate to do more than the kind of reduction which any costs

judge would be expected to do, or which also Carr J would have been likely to do if she had looked at those as prospective figures. That is a reduction somewhere in the region of 30 per cent. So what I'm going to do is allow £75,000 in relation to that figure (and some maths will then have to be done in relation to that).

24. The only other comment which I would make is in relation to the order, I think we've gone through various steps which will have to be taken and various alterations which will have to be made. In relation to the latter part of paragraph 5, it would be good to have clarity on what is required in relation to disclosure of communications relating to disclosures made at meetings.

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