Neutral Citation Number: [2023] EWHC 1005 (Comm)

Case No: CL-2010-000804

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 09/05/23

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

MICHAEL WILSON & PARTNERS LIMITED	**Appellant**
- and -	
JOHN FORSTER EMMOTT	**Respondent**

- -
- -

Stephen Innes (instructed by **Michael Wilson & Partners**) for the **Appellant**
Mr Emmott appeared in person.

Hearing dates: 3 March 2023

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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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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

1. This is the hearing of an appeal by Michael Wilson & Partners Limited ("MWP") from an order of Master Whalan made on 9 November 2019, on the application of Mr Emmott, by which he set aside a default costs certificate issued on 12 February 2019, on the application of MWP. Master Whalan refused permission to appeal and directed that any application for permission to appeal be made to a judge of the commercial court.

2. On the 17 February 2020, MWP issued an appellants notice that was referred to Stewart J on the 16 July 2021. He directed that the appeal be transferred to the judge in charge of the commercial court. That judge then directed the application for permission to appeal be listed before me. It was listed before me on the 16 November 2021. Mr Emmott did not appear and was not represented at the permission to appeal hearing. I granted permission to appeal on ground nine but refused permission on all other grounds for the detailed reasons that I gave at the time.

3. The grounds of appeal, including ground nine, have been settled by Mr Michael Wilson. They were prolix and unnecessarily tendentiously expressed. It is not necessary or desirable therefore that I set out the text of ground nine *verbatim*. In summary, it asserts that the Master was wrong to set aside the default costs certificate on the ground that it had been sought and granted without jurisdiction because, by the time of the hearing before the Master, it was no longer open to Mr Emmott to argue that the default cost certificates should be set aside because Mr Emmott had by his witness statements of the 1May 2019 and 15 July 2019 elected to set off against the sums apparently due from him to MWP under the default cost certificate part of the sums due to Mr Emmott from MWP under the judgment giving effect to the arbitral awards and thereby he had waived or otherwise lost his right to seek the set aside of the default costs certificate. In giving permission to appeal on this ground alone, I commented that whilst I could not fairly or safely conclude this point was unarguable on the material put before me, there were powerful arguments available to Mr Emmott that, until a set off had actually taken effect either by agreement, judgment or arbitral award, there was nothing to preclude him from asserting set off whilst at the same time seeking to have the default cost certificate set aside as having been obtained without jurisdiction. As I said in my judgment I was prepared to grant permission only " … *with some significant hesitation...*" and only because MWP's counsel had not considered the impact of, and, therefore, could not assist me in relation to those issues. None of the relevant case law (the most recent of which I refer to below) was produced at the hearing of the application for permission to appeal. Against that background, I now turn to the facts relevant to this appeal.

4. This appeal has its factual origin in a dispute that arose many years ago between MWP and Mr Emmott, which led to an arbitration between the parties that took many years to resolve. In the course of the arbitral proceedings, the tribunal ordered Mr Emmott to pay MWP's costs in relation to two procedural applications and part of MWP's costs in relation to two other procedural applications. Those orders were made between November 2007 and February 2009. The tribunal ultimately determined liability by an award published in February 2010 and determined quantum by an award published in September 2014 and amended in November 2014.

5. On the 18 January 2019, MWP issued a notice of commencement of detailed assessment proceedings for the arbitral costs referred to above. It exhibited a bill which claimed costs in the total sum of £158, 359.34. On the 19 January 2019, MWP served that notice on Mr Emmott. Mr Emmott failed to serve points of dispute by the stipulated deadline of 11 February 2019. On 12 February 2019, the claimant applied for and obtained a default cost certificate in the total sum £158,505.34. On 18 February 2019, Mr Emmott issued his application to set aside the default certificate supported by his witness statement, also dated 18 February 2019.

6. On 26 February 2019, MWP served Mr Emmott with a statutory demand in relation to the sums apparently due under the default costs certificate even though Mr Emmott had issued and served his application to set aside the default costs certificate. On 13 March 2019, Mr Emmott applied to set aside the statutory demand by an application issued in the County Court at Brighton, supported by his witness statement, also dated 13 March 2019. As will be apparent from what I've said so far, the statutory demand was served by MWP eight days after Mr Emmott had issued his application to set aside the default cost certificate and was thus obviously inappropriate and can only have had the effect of needlessly vexing Mr Emmott. It is the sort of conduct that has plagued this litigation for years, has led to sustained criticism of MWP's conduct by almost all courts up to and including Court of Appeal level and has resulted in an extended Civil Restraint Order being made against MWP.

7. On 7 November 2019, the application to set aside the default costs certificate came before Master Whalan who set aside the default cost certificate pursuant to CPR 47.12(1). He did so on the basis that: (a) the tribunal had not failed or refused to determine costs and MWP's submissions to contrary effect were wrong and unarguable and therefore the court had no jurisdiction to assess costs applying s.63(4) of the Arbitration Act 1996; (b) MWP was wrong to assert that s.63 of the 1996 Act was of no application because the tribunal had ceased to function since (i) in fact the tribunal had not ceased to function as MWP alleged but (ii) even if it had, that did not mean that s.63 ceased to apply; and MWP had not complied with the notice requirements imposed by the terms of s.63(4) of the 1996 Act. Master Whalan then considered and rejected the waiver arguments advanced by MWP at paragraphs 23 – 24 of his judgment in these terms

> "23. The Claimant, in the course of written oral submissions, has raised a number of other arguments, many of which I found at best to be tangential and at worst to be wholly irrelevant, but I am going to deal with two which at least have some arguable basis. The first is the question of set-off. Mr Wilson submits that, in the course of parallel proceedings in the Commercial Court, the Defendant had purported to set off his liability set out in the Default Costs Certificate. Thus, argues Mr Wilson, the bill has been effectively paid, so there is no outstanding default costs certificate and no certificate to set aside. Mr Emmott, in response, first denies that he has purported to set off the sums in the Default Costs Certificate - there is, in other words, a dispute of fact - and second argues that in any event that this is irrelevant to this court's jurisdiction and consideration of the application to set aside the Default Costs Certificate.

> 24. The issue here - and this is my finding - is not whether or not the Defendant has purported to set aside the sum in the Default Costs Certificate but whether or not the Claimant was entitled to that certificate in the first place. Insofar as the answer to that question is no, as I have determined, then the question of alleged purported set-off becomes irrelevant. Either way, in this alleged regard, the jurisdiction is that of the Commercial Court and not this one."

8. Although Mr Emmott did not appear and was not represented at the application for permission to appeal and despite the fact that Mr. Wilson had filed a voluminous bundle of material on behalf of MWP in support of the application, much of which was immaterial, critically that material did not include or refer that Mr Emmott's witness statement of 13 March 2019. I set out the relevant terms of that witness statement below. It cannot have escaped Mr Wilson's attention that its contents were at their lowest highly material to the application and I record that I consider its omission to be a serious failure to present the application for permission fairly. Regrettably, this is all of a piece with the conduct issues mentioned earlier.

9. The 13 March statement was as I have said, served in support of Mr Emmott's application for an order setting aside the statutory demand served on him by Mr Wilson on behalf of MWP in an attempt to enforce the default costs certificate at a time when Mr Wilson was fully aware that Mr Emmott had applied to set it aside and the grounds on which that application had been made. It is necessary that I set out what Mr Emmott said in that statement in paragraphs 2 to 13 of the witness statement, which are in these terms.

> "...
>
> 2 … I say that the demand herein should be set aside on the grounds that
>
> i. the debt claimed in the demand ("the debt")is not due and owing
>
> ii. If the debt is due and owing I have a set off against debts owed to me by MWP which exceed the amount of the alleged debts specified in the demand. ...
>
> **The Debt is not due and Owing**
>
> 5. The debt claimed is for legal costs which were awarded against me in respect of four procedural orders (out of 23 procedural orders in the majority of which MWP was ordered to pay my costs) made in an arbitration between me and MWP ("The arbitration"), which I described more fully below
>
> 6. Without making any attempt to have these costs assessed by the tribunal in the arbitration as required by s. 63(4) of the Arbitration Act 1996 … and without making any application to the court as required under the Act, MWP simply served a Notice

> of Commencement and Bill of Costs. It was not filed in the High Court of Justice, but named the High Court of Justice as the body to assess the cost claimed
>
> 7. Under section 63(4) … a party to an arbitration can only apply to the court for an assessment of its costs In the arbitration if the tribunal do not assess costs. Therefore until the Tribunal in the arbitration had been approached with a request to assess costs and they do not make that assessment or refuse to do so at the Court, does not have any jurisdiction.
>
> 8. It is only after a refusal or failure by the tribunal to assess costs that a party to an arbitration can apply to the court to assess costs. That can only be done by making a formal application.
>
> 9. MWP have not approached the tribunal … with a request to assess costs and made no application to the Court to do so, as is required under the Act. Therefore, the Court has no jurisdiction to assess the costs of MWP the arbitration and no jurisdiction to issue a default cost certificate
>
> 10. However, MWP applied to the court and obtained from the court that default costs certificate dated 12 February 2019 … even though the court did not have jurisdiction to issue it …
>
> 11. I lodged an application to set aside the DCC on the 18 February 2019 … which was issued on the 25 February 2019.... A hearing of this application has been fixed for the 15 April 2019...
>
> 12. unless and until my application to set aside the DCC succeeds and MWP's costs are assessed or it fails, the debt is not due and owing.
>
> **My Right of Set Off**
>
> 13. Even if my application to set aside the DCC fails, I have an absolute right to set off against that sums due to me by MWP the debt or so much of it as may be found to be outstanding..."

10. As is apparent from this evidence, Mr Emmott's case on the set aside application was entirely clear and consistent - he had an application to set aside the default costs certificate, which was proceeding and had been listed for hearing on the basis that it should not have been granted and should be set aside for want of jurisdiction, but even if that failed, he had a set off available to him which he would exercise if the application to set aside the default cost certificate failed. MWP's counsel at the hearing of this appeal accepted that the waiver issue under Ground 9 was unarguable on the basis of this material but maintained that it became unanswerable once the later statements on which MWP relied were considered. I turn to that material below but before doing so I make clear that in my judgment the critical context in which the later statements have to be read include the making of the set aside application, that it was proceeding to a

hearing and had been fixed and that Mr Emmott had made his position entirely clear in his statement of 13 March set out above and that it is wrong in principle to read the statements on which MWP relies other than in that context. That is why in my judgment the failure to include or refer to the 13 March statement at the application for permission was such a serious error.

11. The statements relied upon by MWP are dated respectively the 1 May and 15 July 2019.

12. The 1 May 2019 witness statement was made in support of an application by Mr Emmett for the appointment of a receiver for the purpose of enforcing Mr Emmett's judgement against MWP. In the course of that statement under the subheading "*MWP, has served multiple statutory demands an issued bankruptcy petitions in an attempt to harass me and prevent me enforcing the judgement*" , Mr Emmott said at paragraph 64 of his statement that the statutory demands and petitions that have been served on him by MWP down to the date of that witness statement had been " … *issued and served, despite the fact that I have a right to set off the amounts demanded against the amounts due under the award, a right which I have exercised in each case and which was confirmed by Henderson LJ when giving permission to appeal the Cooke order...*" There were additional comments to broadly similar effect at paragraph 69. It will be readily apparent from the context that Mr Emmott was addressing multiple different statutory demands and petitions at this point in his statement and not merely the statutory demand by which MWP had attempted to enforce the default certificate that Mr Emmott had applied to have set aside.

13. What Henderson LJ had said in the judgment referred to by Mr Emmott was that Mr Emmott was an undisputed judgement creditor of MWP and was entitled therefore to set off against the judgment giving effect to the arbitral award "... *any unsatsified costs order against him* …" in favour of MWP (emphasis supplied). What is meant by a set off in this context requires brief explanation. In law, set off does not extinguish liability until either agreement has been reached that such is to be the effect of the claimed set off or it has been determined by either a judgement or arbitral award that the relevant cross claims are to be netted off – see Stemcor UK Limited v. Global Steel Holdings [2015] EWHC 363 (Comm) *per* Hamlin J as he then was at [34], following earlier authority to similar effect, which in turn was followed in Brown-Forman Beverages Europe Limited v. Bacardi UK Limited [2021] EWHC 1259 (Comm) at [26].

14. As I have said earlier, what Mr Emmott said it in his 1 May witness statement must be read in context. That context consists of: (i) his application to set aside the default costs certificate and the contents of his witness statement in support of his application; (ii) his application to set aside the statutory demand by which MWP attempted to enforce the default costs certificate and the contents of his statement in support of that application dated 13 March 2019; (iii) what Henderson LJ had said in the judgment referred to by Mr Emmott namely there was a right of set off available to Mr Emmott in respect of cost claims against him by MWP that were "*unsatisfied*" and (iv) when in law a set off has the effect of discharging a debt, as to which see the summary above. The relevant context also includes therefore the fact that the costs claimed by reference to the default cost certificate were plainly in dispute as a result of the application to set aside the default certificate and had not been discharged by set off because there was no agreement to that effect between the parties nor any judgment (or arbitral award) having that effect. In relation to this last point, I asked MWP's counsel in the course

of the hearing, whether his client had agreed to set off the costs the subject of the default costs certificate against the award sums due to Mr Emmott. In truth there was no such agreement at any rate by the time of the hearing before Master Whalan. Indeed, as far as I'm aware, MWP has never accepted Mr. Emmott's is entitled to claim set off any sum claimed by MWP against the sums due Mr Emmott other than where there has been an express written agreement to that effect.

15. In that context therefore the notion that MWP or Mr. Wilson could have understood that by what Mr Emmott had said in his 1 May witness statement, he was abandoning his right to challenge the default cost certificate by his then outstanding application is entirely misconceived. It is only if the contents of the statement are read in isolation from the context that I have described that some of the language used by Mr Emmott becomes arguably capable of carrying such a meaning. I reject as unarguable however, the suggestion that the1 May 2019 statement should be read in isolation in this way.

16. The other witness statement on which MWP relies for the purpose of this appeal is that dated 15 July 2019. Similar considerations apply to this witness statement as apply to the 1 May statement. Again, the language read in isolation may suggest that Mr Emmott was defending the statutory demands there referred to exclusively by reference to his claimed right of set off. However, to read the document without regard to the wider context is not permissible. It was well known to all parties, including MWP and Mr. Wilson, that in relation to the outstanding application to set aside the default cost certificate Mr Emmott was not saying any such thing or proceeding on that basis. In any event no set off had been agreed as was required if the claim by reference to the default costs certificate was to be discharged.

17. On this appeal, MWP submits that it is open to any party to waive a jurisdictional defect. In my judgement, that is to state the principles that apply as a matter of English law in far too binary a way. The only authority on which MWP relied was the first instance decision in Brims Construction Limited v. A2M Development Limited [2013] EWHC 3262 (TCC). In my judgement, however, that case is not authority for such a wide and unqualified proposition. That case was concerned with whether the defendant in that case had waived a right to challenge the jurisdiction of an adjudicator to determine a construction dispute under the statutory adjudication scheme that applies to such disputes. In my judgment, the question in every case is whether there has been an express waiver, and there has not been on the facts of this case, or whether it can be said that by his words or conduct after 13 March 2019 Mr Emmott waived his right to argue the jurisdiction issue that arose on the application before Master Whalan. Whilst arguably the position might have been different had the set aside application been issued after, rather than before, the witness statements relied upon by MWP had been served, the reality is different. The application to set aside the default costs certificate had been issued and served and the evidence in support of that application and the later evidence in support of an application to set aside the statutory demand made it perfectly clear what Mr Emmott was saying concerning the default certificate and in my judgment once that context is understood, MWP's claim based on waiver is unarguable. The notion that the claim had been settled by set off is unarguable as a matter of law because there was no agreement between Mr Emmott and MWP by which the costs the subject of the default certificate were to be set off against the sums due to Mr Emmott from MWP.

18. The issue with which this appeal is concerned was considered by the Master at paragraphs 23-24 of his judgement set out earlier. Whilst I agree with paragraph 24 as far as it goes, the real point was whether Mr Emmott had waived the right to challenge the default cost certificate in the circumstances that prevailed or whether the sum, the subject of the default costs certificate, had been settled by an agreed set off. As I have explained, (a) there was no agreement to settle the claim, the subject of the default cost certificate by set off, at least by the date of the hearing before the Master so the debt the subject of the certificate had not been discharged and (b) on any fair reading of the material taken as a whole, including the material on which MWP relies as constituting a waiver by Mr Emmott of his right to challenge the direct default costs certificate, the argument that Mr Emmott waived his right to continue to challenge the issue of the default certificate on jurisdictional grounds by filing and serving his May and July witness statements is unarguable.

19. In those circumstances, this appeal fails and is dismissed.