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Neutral Citation Number: [2024] EWHC 1463 (Comm)

Claim No: LM-2023-000157

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL
Date: 13 June 2024

Before
Philip Marshall KC (sitting as a Deputy Judge of the High Court)

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Between:

EXPORIEN MINING PRIVATE LIMITED COMPANY
Claimant

-and-

AGGREKO INTERNATIONAL PROJECTS LIMITED
Defendant

- -

JUDGMENT

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Kira King (instructed by Hogan Lovells International LLP) for the Claimant
Joseph Farmer (instructed by Baker & McKenzie LLP) on behalf of the Defendant
Hearing date: 3 May 2024

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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.

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 Thursday 13 June 2024.

PHILIP MARSHALL KC:

Introduction

1. There are applications by the Claimant **("Exporien")** seeking extensions of time for it to provide security for costs as required under the order of His Honour Judge Pelling KC (sitting as a Judge of the High Court) dated 8 November 2023 **("the November 2023 Order")** and a cross-application by the Defendant **("Aggreko")** seeking an order striking out the claim for failure to comply with both that order and a further order for costs.

2. The applications were previously before the court on 25 March 2024 but were adjourned as a result of the inadequate time available for them properly to be heard and determined.

3. The applications made by Exporien have not been correctly formulated. In reality Exporien seeks more than an extension of time for the provision of security. It also seeks a variation of the November 2023 Order in terms of the type of security to be provided. That order required security to be provided by making a payment into court of £76,000 by 4 pm on 8 February 2024. Exporien proposes that security should take the form of an "after the event" insurance policy that will cover any adverse costs against it. Although its applications have not been formally amended to include provision for such relief it seems to me appropriate to consider them as if they had been. This proposal is one that Aggreko has been fully aware of well in advance of the hearing, has addressed in submissions and would need to be considered in the context of its own application to strike out. I can therefore see little prejudice in considering the issues relating to variation of the November 2023 Order, encompassing the issue of the form of security as well as an extension of time, and it would also be appropriate to do so having regard to the requirements in CPR rule 1.4(1) and 1.4(2)(i) (which encourage the court to seek to determine as many outstanding matters as possible on the same occasion so as to avoid multiple hearings). If permission is required to amend the application notices issued by Exporien in order to facilitate this then I will grant that permission.

The Claim

4. Exporien is a Zimbabwian company and Aggreko is based in Scotland.

5. The claim arises out of a consultancy agreement made between the parties dated 5 August 2010, renewed on 5 August 2015. The consultancy related to the provision of various forms of assistance by Exporien in respect of the promotion of Aggreko's business and products in Zimbabwe, which included the supply of electrical, gas or diesel generators and temperature control machinery. In the event that contracts for the provision of power were entered into by Aggreko as a result of introductions, negotiations or "other efforts" of Exporien then a commission, representing a percentage of various forms of revenue received, was to be paid.

6. In essence Exporien contends that a contract entered into between Aggreko and Sakunda Holdings (Private) Limited ("**Sakunda**") met the requirements for payment of a commission under the agreement. Exporien contends that a sum estimated to be in excess of US$1 million is therefore payable. Aggreko admits the existence of the consultancy agreement with Exporien and that it entered into a supply contract with Sakunda but contends that this resulted from an introduction made by a commodity broker, Trafigura Group Pte Ltd, and that no commission is payable to Exporien.

7. Proceedings were issued in January 2022 but thereafter a stay was agreed to enable settlement discussions to take place. This was implemented by various consent orders and only terminated, over a year later, on 23 February 2023 after the negotiations proved to be unsuccessful. Statements of case were then completed with the service of a Reply on 18 March 2023.

<u>Security for Costs</u>

8. It was at this point that Aggreko sought security for its costs which was granted after a contested hearing on 8 November 2023 in the form of the November 2023 Order. In granting security Judge Pelling rejected a contention that this would stifle the claim. He was not satisfied on the evidence that such a case was satisfactorily made out. Nevertheless, as already mentioned, he allowed Exporien until 8 February 2024 to make the required payment into court by way of security. The grant of this relatively generous period was explained in the judgment, at [16] and [17]:

"16. The final question concerns when the sum should be paid. There is some unsatisfactory evidence concerning the possibility of some after-the-event insurance being obtained,

although the terms on which such insurance can be obtained, and the cost of it, and how that cost would be met are not addressed in the evidence. It is possible that such insurance could constitute proper security depending on its terms but until the policy or a draft policy is produced, it is impossible to say whether that is so or not. If such insurance was available, then it should have been obtained by now.

17. In those circumstances, it would not be appropriate to give anywhere near the six months that it is suggested on behalf of the claimant it should have in order to raise the security. In my judgment, no more than three months is appropriate, but I will hear counsel briefly after the conclusion of this judgment on the terms of the order and any period that should be allowed to produce the relevant security. Broadly, however, and provisionally for present purposes, I have in mind an order that security be provided by 4pm up to three months from today with the claim being stayed in the meanwhile with liberty to the defendant to apply for an order dismissing the claim in the event of non-compliance".

9. The November 2023 Order also required Exporien to pay the costs of the security for costs application (including those incurred in an earlier hearing that had had to be adjourned because Exporien belatedly sought permission to serve further evidence) summarily assessed at £27,398. This was to be paid by 4 pm on 22 November 2023.

10. Exporien has failed to comply with this costs order and it still remains outstanding. It has also not paid any sum into court but has instead pursued further the possibility of "after-the-event" insurance. It contends that its negotiations with potential insurers have borne fruit and with the benefit of a policy now on offer it will be able to comply with the outstanding costs order and provide acceptable security in the amount specified in the November 2023 Order. It says that acceptance of the policy as sufficient security is required, however, before funds can be released to meet the outstanding costs order.

11. By contrast Aggreko contends that the proceedings should now be struck out having regard to the defaults that have already occurred and the previous conduct of Exporien.

The Applications

(1) Can the applications of Exporien be entertained?

12. The first issue on Exporien's applications, in so far as a variation of form of security is concerned, is whether they can be proceeded with at all. Under the provisions of CPR rule 3.1(7) the court has the power to vary or revoke an order. In Tibbles v SIG PLC [2012] 1 WLR 2591, the Court of Appeal reviewed the authorities on this provision and then provided the following guidance at [39] –[42] (per Rix LJ with whom all other members of the court agreed):

"*39. In my judgment, this jurisprudence permits the following conclusions to be drawn:*

(i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR r 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.

(ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this

debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.

(v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(vi) Edwards v Golding [2007] EWCA Civ 416 is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.

40. I am nevertheless left with the feeling that the cases cited above, the facts of which are for the most part complex, and reveal litigants, as in Collier v Williams [2006] 1 WLR 1945, seeking to use CPR r 3.1(7) to get round other, limiting, provisions of the civil procedure code, may not reveal the true core of circumstances for which that rule was introduced. It may be that there are many other, rather different, cases which raise no problems and do not lead to disputed decisions. The revisiting of orders is commonplace where the judge includes a "Liberty to apply" in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable. In this connection see the opening paragraph of the note in the White Book at para 3.1.9 (Civil Procedure 2012 , vol 1, p 60) discussing CPR r 3.1(7) , and pointing out that this "omnibus" rule has replaced a series of more bespoke rules in the RSC dealing with interlocutory matters.

41. Thus it may well be that there is room within CPR r 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind

the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time . On that basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court.

42. I emphasise however the word "prompt" which I have used above. The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made. Promptness in application is inherent in many of the rules of court: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR r 3.9(1)(b)). Indeed, the checklist within CPR r 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order".

13. The principal basis for the applications now made by Exporien is a contract for "litigation insurance". This was made on 21 March 2024 between Markel International Insurance Company Limited **("Markel")**, Exporien and its solicitors, Hogan Lovells International LLP but was then amended on 5 April 2024 **("the Policy")**. The policy is for cover of £170,000 in respect of "Opponents Costs & Own Disbursements" including £30,000 for "Own Counsel Fees". Details of the premium have not been disclosed.

14. There is, however, no evidence that the Policy could not have been obtained prior to the hearing before Judge Pelling on 8 November 2023; on the contrary, as Judge Pelling observed in his judgment, at [17], which I have quoted above, if such a policy was obtainable it ought to have been provided prior to that hearing. If it could have been sought earlier, its creation later would not be a material change of circumstance (see Recovery Partners GP Ltd v Rukhadze [2018] 1 WLR 1640, at [37]). The third witness statement of Ms. Lambert, dated 6 March 2024, at paragraph 14, now frankly admits that no application for funding from litigation funders was made until after the November 2023 Order. But no reason is given for the failure to apply for it earlier other than that the provision of security was being resisted. I do not regard that as an adequate explanation:

as recorded in the above judgment of Judge Pelling, the only basis for opposing the grant of security was the prospect of the claim being stifled and such a contention could not properly be advanced if the means of providing security (whether through third party funders or otherwise) was potentially available.

15. In further support of its applications Exporien relies upon the first witness statement of Joan Chikowore and the second witness statement of Samuel Taurayi Chikowore. This evidence is designed to support the contention that Exporien has no other way of complying with the requirements for security in the November 2023 Order other than through the Policy. However, this is one of the issues that was considered by Judge Pelling when making the order for security. He specifically rejected the suggestion that Exporien was unable to comply with such an order. All of the evidence of Mr. and Mrs. Chikowore relates to matters that either were taken into account by the learned Judge when he came to his decision or could have been raised before him had Exporien chosen to do so. There has been no appeal against the November 2023 Order and the matters raised in this evidence do not appear to me to show any material change in circumstances sufficient to justify my reconsidering the issues that were before the court in November last year.

16. In light of the above, in my judgment this is not a case like that of Saxon Woods Investments Ltd. v Costa [2023] EWHC 850 (Ch) where an application to vary the form of security for costs can genuinely be said to arise from some material change of circumstances.

17. Nevertheless, exceptionally, I do consider this to be a case in which the court can entertain the application:

    17.1. Unlike the case of Recovery Partners this is not one in which the form of security originally agreed or ordered has been in place for some time and the defendant could be said to have taken steps in reliance upon it remaining in place. No payment into court has occurred and the proceedings have remained stayed in the interim.

    17.2. Although the applications of Exporien cannot be described as having been made particularly promptly, it did act before the time limit for provision of security expired

and no material prejudice appears to have been caused to Aggreko since the proceedings have been stayed in the intervening period. As explained in Tibbles, at [42], it is the potential prejudice caused by delay that normally mandates promptness in the application.

17.3. The way in which paragraphs 16 and 17 of Judge Pelling's judgment of 8 November 2023 are expressed suggests that he anticipated that an "after-the-event" insurance policy might still be sought (despite the form of his order) and that he set the time limit for the provision of security partly by reference to this.

17.4. The above conclusion is fortified by the fact that, when considering the present applications when they came back before him on 25 March 2024, Judge Pelling did not regard them as capable of dismissal in limine having regard to his earlier order and the lack of any material change of circumstance. Rather directions were given for a further hearing after observations regarding the potential deficiencies in the Policy as it then stood.

17.5. This suggests that, although not expressly provided for, it was implicit within the provision for liberty to apply in relation to time in paragraph 4 of the November 2023 Order that there was liberty also to raise the possibility of "after-the-event" insurance as a form of security. In this regard I note the observations made at [40] by Rix LJ in Tibbles.

(2) Does the Policy provide sufficient protection?

18. It is now established that an "after-the-event" insurance policy can in principle provide an alternative to a payment into court as security for costs. Whether or not it provides "sufficient protection" (being the phrase used in the authorities) will often depend on the existence of anti-avoidance provisions that prevent the policy being rendered ineffective in circumstances where insurers have been misled. This was explained in Premier Motorauctions Ltd. v PricewaterhouseCoopers LLP [2018] 1 WLR 295, where the absence of an anti-avoidance provision meant the policy in issue was not sufficient to prevent an order for some other form of security to be provided. Longmore LJ described the general approach at [30] to [32]:

"30. Authorities at first instance go both ways but the judgment of Snowden J reveals that there may be a tendency (I put it no higher) for judges at first instance to accept that an ATE policy can stand as security for costs. The judge was particularly impressed by remarks of Stuart-Smith J in Geophysical Service Centre v Dowell Schlumberger (ME) Inc 147 Con LR 240 , in para 15 of which he made two observations about Nasser's case:

> *"First of all, Mance LJ was there commenting in the abstract, since there was not in fact an ATE policy in existence. Second, Nasser's case dates from 2001 when the ATE market was considerably less mature than it is now. It must be recognised both that the market is now more mature and that Brit, who provided the insurance which is going to be considered in this case, is to be regarded as a reputable insurer within the market. It is also to be recognised in my judgment that the funding of litigation by ATE policies is, and has for some years now, been a central feature of the ability of parties to gain access to justice. In the absence of evidence to the contrary, the court's starting position should be that a properly drafted ATE policy provided by a substantial and reputable insurer is a reliable source of litigation funding."*

The judge also cited para 20:

> *"Ultimately, on an application such as this, the question is not whether the assurance provided by an ATE policy is better security than cash or its equivalent, but whether there is reason to believe that the claimant will be unable to pay the defendant's costs despite the existence of the ATE policy. It must now be recognised, in my judgment, that depending upon the terms of the policy in question, an ATE policy may suffice so that the court is not satisfied that there is reason to believe that the claimant will be unable to pay the defendant's costs."*

31. I have no fundamental quarrel with these observations but would emphasise the words "properly drafted" and "depending on the terms of the policy in question" in these paragraphs because there was in the Geophysical case an anti-avoidance provision of the kind which Mance LJ envisaged in Nasser's case. It is set out in para 23 in the following terms: "8. The insurer shall not be entitled to avoid this policy for non-disclosure or misrepresentation at the time of placement except where such non-disclosure was fraudulent on your part." Insurers could therefore avoid for fraud but not otherwise. It may not be a particularly difficult exercise for a judge to assess the likelihood of avoidance if the right to avoid is confined to fraud but, where there is no anti-avoidance clause of any kind, the exercise is very much more difficult and the defendants' need for the assurance to which Mance LJ referred is all the greater.

32. I would, however, take issue with the suggestion that access to justice has quite the relevance which Stuart-Smith J thought it had since, as Mr Fenwick and Mr Zellick submitted, that consideration is more normally relevant to the possibility that an order for security might stifle a claim. As I have already said, that is not a point that arises in this case".

19. The authorities also indicate that the provision of a satisfactory policy providing "sufficient protection" can be used to found a variation to an order security for costs by way of a payment into court. This is what occurred in the Saxon Woods Investments case.

20. In determining whether "sufficient protection" is provided helpful guidance is also provided as to the correct approach in Harlequin Property (SVG) Ltd. v Wilkins Kennedy [2015] EWHC 1122 (TCC) where Coulson J, explained at [21], having reviewed a number previous decisions, including Michael Phillips Architects Ltd v Cornel Clark Riklin [2010] EWHC 834 (TCC) and Verslot Dredging v HDI Gerling Industrie Vesicherungag AG [2013] EWHC 658 (Comm):

"21. As a matter of principle, therefore, I conclude from this brief tour of the authorities that:
(a) Adequate security for costs can be provided to a defendant by means other than a payment into court or a bank guarantee;
(b) Depending on the terms of the insurance and the circumstances of the case, an ATE insurance policy may be capable of providing adequate security;
(c) There may be provisions within the ATE insurance policy which a defendant can point to and say that, on the happening of certain events, those provisions may reduce or obliterate the security otherwise provided;
(d) In that event, the court should approach such objections with care: in order to amount to a valid objection that an ATE policy does not provide appropriate security, the defendant's concern must be realistic, not theoretical or fanciful".

21. As mentioned earlier, in this case the Policy was subject to amendment on 5 April 2024. According to the evidence of Exporien's solicitor, Ms. Akima Paul Lambert, this was so that certain historic costs were covered and an "anti-avoidance mechanism" was increased to £76,000 (being the amount of the security for costs ordered under the

November 2023 Order). As regards historic costs she states that the Policy "is therefore anticipated to include for the most part the outstanding costs order made by Pelling KC in November 2023 even though it is not included as part of the sums ordered by way of Security for Costs". As regards "anti-avoidance" she draws attention to the schedule to the Policy which provides that in respect of cover of up to £76,000 this "cannot be avoided for any reason and is not subject to the cancellation and avoidance provisions including for misrepresentation or non-disclosure". These changes were evidently put in place to address potential objections to the form of the insurance on offer.

22. Aggreko nevertheless contends that the Policy still does not provide sufficient protection and is an inadequate substitute for a payment into court. Four specific defects are identified:

22.1. First, it is said that there is no cover for certain types of adverse costs, namely (a) costs assessed on the indemnity basis insofar as they exceed what would have been recovered on the standard basis; (b) wasted costs or costs in relation to unreasonable behaviour; and (c) costs incurred as a result of or consequential upon the previous security for costs application or any amendment of the Particulars of Claim.

22.2. Secondly, it is pointed out that there is no cover if there is no signed valid damages based agreement or conditional fee agreement in place and there is no evidence that one has been put in place.

22.3. Thirdly, it is said that there is no cover if Exporien's solicitors deem the prospects of success to be lower than 50%.

22.4. Fourthly, it is not accepted that the wording of the Policy makes it clear that the costs awarded under the November 2023 Order are covered and do not reduce the sum of £76,000 which was not to be the subject of anti-avoidance provisions.

23. As regards the first form of objection I do not regard the concerns over assessment on the indemnity basis as a proper objection. In assessing the appropriate quantum of security in this case I do not detect anything to suggest that Judge Pelling was proceeding otherwise than by reference to the likely recoverable costs on a standard basis of assessment. As

regards wasted costs, these would normally be sought as against those representing a party not the party itself. As regards costs arising from unreasonable behaviour, these appear to me to fall into the same type of category as indemnity costs for present purposes. As regards costs incurred as a result of the security for costs application and any amendment, however, it seems to me that the point has substance. The Policy itself is unclear as to whether these are covered (amendment appears to be excluded by clause 17(rr)(ii) of the Policy) and have been excluded from the figure of £76,000 that is the subject of the anti-avoidance provisions. I would also wish to have assurance that any costs awarded against Exporien in respect of the applications currently before me were covered by the Policy and would not reduce the figure that was expressed to be subject of the anti-avoidance clauses.

24. As regards the second form of objection, this also appears to have substance. Clause 17(a) of the Policy has a requirement for a damages based agreement or conditional fee agreement to have been signed. There is no evidence that this has been complied with.

25. The third objection does not appear to be a point of substance so long as (a) immediate notice to Aggreko was required if any such termination occurred; (b) such termination did not affect ability of Aggreko to recover its incurred costs up to the point of receipt of such notice under the Policy; and (c) no such termination could occur prior to the first case management conference.

26. The fourth objection appears to me to have substance but does not appear to be separate from the points I have already addressed in respect of the first form of objection.

(3) The Strike out application

27. In light of the above, I now turn to the application of Aggreko to strike out. As already mentioned, this is made on the basis of both the failure to comply with the costs order for £27,398 and for the failure to provide security for costs by a payment into court.

28. As regards the failure to pay the outstanding costs order, it would be highly unusual to make an order simply striking out the claim before a peremptory order had first been made. The usual course would be to make an "unless" or peremptory order providing that unless payment was made within a defined timescale then the claim would be struck out (see, for example, Crystal Decisions UK Limited v Vedatech Corp [2006] EWHC 3500 (Ch) and Michael Wilson & Partners v Sinclair [2017] EWHC 2424 (Comm)). This in effect provides the party in default with a last opportunity to comply. In my judgment there is no

reason to depart from that course here. I will therefore make an order in “unless” form for these outstanding costs to be paid. The amount to be paid will include not only the principal sum but interest at the judgment rate for the period of default.

29. As regards the failure to provide the security ordered, this has been the subject of applications for further time that were made before the time limit in the November 2023 Order expired. In my judgment it would also be inappropriate and disproportionate to strike out the claim immediately in these circumstances. The appropriate course in my judgment is for an “unless” order to be made requiring either (a) a payment into court as ordered; or (b) clear confirmation that each of the matters I have raised above as proper objections are fully addressed either by amendment of the Policy or, in the case of conditions relating to the damages based agreement or conditional fee agreement, confirmation from Markel or Hogan Lovells that these have been put in place.

30. Given the history of this matter and the importance of bringing this satellite litigation over security for costs to an end, I will require both the outstanding costs and matters regarding security to be fully and properly dealt with within 21 days of the date of the order.

Conclusion

31. I will invite the parties, in the first instance, to seek to agree a minute of order reflecting what I have set out above. I will hear any further argument regarding the form of the order at the same time as submissions on any other consequential matters, including costs.