Neutral Citation Number: [2024] EWHC 3021 (Comm)

Claim No: CL-2022-000218

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Friday, 22nd November 2024

Before:

MR. JUSTICE PICKEN

- -

Between:

NMC HEALTH PLC (IN ADMINISTRATION)	**Claimant**
- and -	
ERNST & YOUNG LLP	**Defendant**

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- -

MR. SIMON SALZEDO KC, MR. TOM PASCOE, MR. CHINTAN CHANDRACHUD and **MR. JAMES SHAERF** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) appeared on behalf of the **Claimant**

MR. THOMAS PLEWMAN KC, MR. EDWARD HARRISON and **MS. KATHERINE RATCLIFFE** (instructed by **RPC LLP**) appeared on behalf of the **Defendant**

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Approved Judgment

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MR. JUSTICE PICKEN:

1. This is a further hearing in a very complex and involved case. I have had several hearings in relation to it over the course of the last few weeks. I have been told from the outset of my involvement that there was to be an adjournment application, which is now the application that I am hearing today.

2. The adjournment application is made by the Defendant, Ernst & Young, represented by Mr. Plewman KC, Mr. Harrison and Ms. Ratcliffe, and is premised on the proposition that the case cannot be ready for trial, the current trial fixture being one which sees the case formally starting on 29th April 2025 with a reading week and the hearing itself starting the following week on 6th May 2025.

3. When I refer to the submission being that the case cannot be ready for trial, rather more specifically I mean by that to record Mr. Plewman's submission, and that of Mr. Harrison, who also addressed me orally at today's hearing, that Ernst & Young cannot be ready for trial.

4. Mr. Salzedo KC, Mr. Pascoe, Mr. Chandrachud and Mr. Shaerf, adopt a different stance. They are clear that the case can be ready for trial and indeed they submit that it should be ready for trial, given that the fixture has been in place for some considerable time.

5. I should deal briefly with the relevant legal principles. Mr. Plewman reminds me that the Court has a discretion to adjourn pursuant to CPR 3.12(b) that falls to be exercised in accordance with the Overriding Objective and which includes the need to ensure that the parties are on an equal footing so far as practicable (see CPR 1.1(2) (a)).

6. I have been referred by both counsel to a number of authorities and I do not find it necessary to refer to all of them. Indeed, I note that O'Farrell J, in a relatively recent case, IBM United Kingdom Limited v lzlabs GmbH IBM [2023] EWHC 3015 TCC, regarded it as unnecessary to cite specific authority when she said the following at paragraph 19:

> "No authority is needed for the proposition that there must be a fair hearing. The court must give the parties a reasonable opportunity to prepare and present their case. But that does not entitle a party to unlimited preparation and hearing time, particularly where that would result in unacceptable delay to resolution of the dispute or loss of a fixed trial date. When considering an application to adjourn a trial, the court must carry out a balancing exercise, endeavouring to manage the case so as to hold the trial date to which everyone has been working, whilst ensuring the least risk of irremediable prejudice to any party in all the circumstances of the case, which may necessitate revising the timetable or adjourning the trial."

7. Although O'Farrell J did not refer to authority it is fair to say there is a fair body of authority, the most notable of which is the decision of the Court of Appeal in ***Bilta***

UK Limited v Tradition Financial Services Limited [2021] EWCA Civ 221. In that case Nugee LJ said at [30] as follows:

> "In those circumstances we were taken to a number of authorities, dating back to long before the introduction of the CPR, and received much more extensive submissions on the law than it appears the Judge did. I consider the authorities below, but it may be helpful if I indicate my conclusions on the relevant principles at the outset. These are that Mr Scorey is right that the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist ... And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

8. That is an authority which has been cited in subsequent cases, including by Trower J in ***JSC Commercial Bank Privatbank v Kolomoisky*** [2022] EWHC 775 (Ch) at [22]. In that same case, Trower J said this at [103]:

> "There is no doubt that it is in the public interest, as well as the interest of those seeking to enforce their rights that trial dates should if at all possible be maintained.
>
> Nonetheless, it has always been recognised that there are circumstances beyond the control of the litigants which mean that it is not reasonable to expect a party to continue with preparing a case for trial with the consequence that, if the trial were to commence, it would be unfair. As Bilta makes plain, any such situation will be compelling grounds for an adjournment."

9. Lastly, and relevantly, I should make reference to another case in which ***Bilta*** was cited, namely ***Maroil Trading Inc, Sea Pioneer Shipping Corporation v Cally Shipholdings Inc*** [2022] EWHC 1201 (Comm), where Foxton J, having referred to ***Bilta*** at [7], went on to say this at [8]:

> "It is important to recognise that delay in this long-running action would cause serious prejudice to the Claimants, who on their case have suffered loss for which they have not had compensation for many years. But it is accepted by Mr Grant QC for the Claimants that, in many ways, the ultimate issue when it comes to the question of whether that October fixture can be held is whether, if the trial went ahead on that date, it would be fair in all the circumstances. If there are circumstances in which a fair trial could be conducted, the circumstances in which the trial would nonetheless be

> adjourned would be rare indeed. By contrast, if a fair trial could not fairly take place, then an adjournment will usually be granted regardless of inconvenience to the other parties."

10. The common theme, or the main common theme, from these various authorities is the need to ensure that there is fairness and to balance the need to ensure that, if the trial is maintained and an adjournment refused, there is fairness to the party who is seeking the adjournment, against the policy consideration identified in the authorities not to grant adjournments too liberally. It is with that guidance in mind that I now approach the present application.

11. That application has two main limbs, although in saying that I should point out immediately that I have been provided with detailed written submissions and have had detailed oral submissions. I confirm that I have had regard to everything that has been written and said.

12. The first main aspect -- and I repeat that I am conscious that it would be wrong to say that there are only two aspects that arise -- concerns the late appearance of what have been described as the EYME documents, EYME being shorthand for Ernst & Young Middle East, the actual entity that performed the relevant audits of the Claimant company NMC over the seven years in the present case.

13. Those documents have emerged late in the day. Each side is somewhat inclined to blame the other for the lateness of that emergence. It is unnecessary, in the circumstances, and probably not entirely possible, for me to make an assessment as to where blame lies or if it lies on either side as opposed to both or neither at all.

14. What instead is my current focus is the proposition advanced by Mr. Plewman on behalf of Ernst & Young that the late emergence of this documentation means that the expert instructed by Ernst & Young on auditing matters, namely Mr. Mount, is unable to produce his expert report in the current timescale, namely mid-December, and indeed will be unable to do so for some considerable time.

15. Specifically, the suggestion made coming into this hearing was that Mr. Mount would require some six months or so in order to produce that report, although during the course of submissions Mr. Plewman has, realistically and sensibly, somewhat rowed back from that time estimate and instead has suggested that Mr. Mount would need at least 16 weeks or so to do so.

16. An aspect here which has been the subject of some debate concerns the number of documents concerned. In very broad terms, the baseline number is in the region of 50,000 documents. However, it is accepted by Ernst & Young that, in truth, that is an unrealistic number, in the sense that it will contain duplication and documents which, on a readily achieved review, will bring the number down. There is, however, a dispute between the parties as to what number will then be arrived at.

17. There is a suggestion, or was a suggestion in a letter from Mr. Daboo, the expert auditor instructed by the Claimant NMC, to Quinn Emanuel, NMC's solicitors, dated 18th November 2024, that the population of documents numbers a mere 11,000 or so, namely 16,479 documents, from which a reduction of 5,539 fell to be made. In the relevant letter in the last paragraph, this was stated:

> "Based on an estimate of 16,479 documents and taking into account the application of EY's keywords which reduces the documents by a further 5,539 and the details about their sizes, I consider that an efficient and structured review of this material using the support available from my team would take considerably less than Mr. Mount suggests. I would estimate that this would take approximately five-six working weeks on the basis of my five current team working full time with the support from the broader legal team to isolate such documents bank confirmations ....".

18. That letter led to a letter from the solicitors acting for Ernst & Young, RPC, on 21st November to Quinn Emanuel in which, among other things, the paragraph which I have just read out was addressed, in paragraphs 19 and 20, in this way:

> "Even if NMC is correct that half of the EYME documents can indeed be disregarded by the audit experts, which is doubtful, 28,635 EYME documents would still need to be reviewed by the audit experts. Extrapolating from Mr. Daboo's views in his letter dated 18th November 2024 it would appear Mr. Daboo believes that he would require some 16 working weeks or at least four months for such a review plus additional time to update his report. That is likely to mean that his updated report would not be complete before end of March 2025. This is a further indication that the current timetable is unsustainable."

19. As I say, those passages and the underlying issues which they address have been the subject of some discussion between the Court and counsel today. Mr. Plewman says, consistent with RPC's letter, that logically if, as is now accepted, the relevant documents falling to be considered by the auditing experts amount to some 16,000 or so, then rather more than the five to six weeks Mr. Daboo identified in his letter will be required and, in those circumstances, it is unfair to expect Mr. Mount to do what is required in any shorter timescale. Indeed, consistent with the RPC letter, Mr. Plewman submits that at least 16 weeks, or four months, is what is required.

20. Against that, Mr. Salzedo has explained that, in reality, the review required will rapidly enable the auditing experts to bring the number of relevant documents (as in documents which they will need to address in their reports) down very considerably. He suggests that Mr. Daboo's letter should be read as his saying that the five to six weeks that what he requires to do would entail not considering a mere 11,000 documents but the entirety of the 50,000 or so population, but, as just indicated, the bringing of the documents down to what really needs to be considered will not take that long.

21. This is one of the aspects that I have to consider in relation to this adjournment application.

22. Another concerns the forensic accounting evidence which the parties are seeking to deploy. I should say that, like Mr. Daboo's report which was served on Ernst & Young in mid-August this year, the forensic accounting expert, Mr. Johnson, instructed by NMC served his report at the same time. Both reports therefore are

reports which their expert counterparts instructed by Ernst & Young, namely Mr. Mount, the auditing expert, and Mr. Wreford, the forensic accounting expert, have had for some considerable number of months already.

23. However, focusing for present purposes on the forensic accounting evidence, Mr. Harrison very helpfully explained and expanded on the points raised in his and Mr. Plewman and Ms. Ratcliffe's skeleton argument. I do not propose to address those points in any detail save to make some relatively high-level observations.

24. The first and most stark is that Mr. Wreford tells Ernst & Young and RPC that he requires eight months to do the necessary work to prepare his report, in the light of certain deficiencies which he has identified, and seeks to highlight, in relation to Mr. Johnson's report.

25. Those deficiencies are said to include the fact that Mr. Johnson does not deal with every issue that he, Mr. Wreford, and Ernst & Young consider he ought to deal with. Secondly, they concern the fact that the exercise which Mr. Johnson has done has been complemented, or at least added to, by one of the factual witnesses for NMC, namely Mr. Jones.

26. The third matter identified is that Mr. Jones has produced what is described by Mr. Harrison as a relatively short statement, albeit he acknowledges that it has attached to it a considerable number of other documents containing considerable detail which Mr. Wreford would need to work through.

27. A further complaint is made that neither Mr. Johnson nor Mr. Jones, as I have indicated, deals with matters in the depth that Ernst & Young and Mr. Wreford consider is necessary.

28. Lastly, certain errors have been identified on the part of Mr. Jones in particular, which Mr. Wreford observes he has to address.

29. There are in this context further issues concerning the availability of documents other than in hard copy and then, moving on and being careful not to elide issues too much, there are further issues relating to what might be described as quantum-type matters involving documentation that again has come into existence relatively recently.

30. For these reasons, the submission made by Mr. Harrison is that it is simply not going to be fair to require Mr. Wreford to serve his expert's report in December or, realistically, at a subsequent date because nobody is suggesting, in the circumstances, that the December date should be maintained.

31. In consequence, just as it would be unfair to require Mr. Mount to do the same in the auditing context, the timetable proceeding towards the current fixture is unfair to Ernst & Young, with the further consequence, necessarily, Mr. Plewman and Mr. Harrison submit, that the trial currently fixed to start on 29th April/6th May is not viable and would entail unfairness of the sort described in the authorities to which I have referred.

32. I have considered these matters with some care. There are detailed responses which Mr. Salzedo has sought to put forward, in particular as to the detail of Mr. Johnson

and Mr. Jones's evidence and there are more general points of the sort again that Mr. Salzedo has sought to highlight, but consisting primarily of the fact that Mr. Daboo's report and Mr. Johnson's report, together with Mr. Jones's witness statement, have been available to Ernst & Young and their respective experts for a considerable period of time.

33. Accordingly, in those circumstances, Mr. Salzedo submits that it is unrealistic to suppose that the experts instructed by Ernst & Young are now in effect having to work from a standing start. Quite clearly, they are not having to work from a standing start and nor indeed has it been suggested by them or by Mr. Plewman and Mr. Harrison that they have done nothing, because, quite responsibly, they plainly have done a lot.

34. However, the bottom line, it seems to me, is this: in circumstances where the existing deadline is the middle of December and in circumstances where, whilst there is now further work to be done, is it realistic to suppose that the substantial further time extensions which both experts say they need should be afforded to them and to Ernst & Young? I have reached the clear conclusion that it is unrealistic that they should be seeking that further level of time. On the contrary, it seems to me that realistically, although this is a very large case involving a substantial amount of money, it is not so unusual a case as to mean that when these types of issues arise, as typically they arise in Commercial Court litigation all the time, there should be the adjournment sought.

35. This is a fixture which involves a trial due to last some 15 weeks. That trial which has been fixed for a considerable amount of time. To vacate that trial, it would be unfair to other court users, although I acknowledge, consistent with the authorities, that if I thought the trial would be unfair to Ernst & Young, then that would not be an impediment to its adjournment.

36. But my clear conclusion is that there is simply not the unfairness that has been suggested. On the contrary, it seems to me that the work that needs to be done can (and must and should) be done in a timescale which will enable the trial to take place, albeit with an adjustment to its start date, which we can come on briefly to discuss now.

37. There is a further matter which I must record as weighing in the balance. This concerns the fact that the Claimant, like any claimant having brought its claim, will be deprived of its financial success, if successful in the claim, for a considerable period were there to be an adjournment. However, this particular claimant has another feature, which has been described by Mr. Fleming in his second witness statement dated 31st October 2024, namely the fact that it is in receipt of external third-party funding.

38. Mr. Plewman reminds me that litigation funding of this nature is now commonplace and, by reference to ***Rowe v Ingenious Media Holdings Plc*** [2021] EWCA Civ 29, makes the submission that the fact that there is litigation funding for a particular claimant is essentially a matter between the claimant and the third party funder and is not a feature which should have great sway in relation to the defendant who is sued by the claimant.

39. That was a case dealing with whether there should be a cross-undertaking in respect of security for costs. As I explained, however, to Mr. Plewman during the course of his helpful submissions, I did not find the case overly helpful on the current point. What matters for present purposes is a rather different one, which is that Mr. Fleming has estimated (see paragraph 16 of his witness statement) that, were there to be an adjournment of the type sought, which at least on the application contemplates the trial starting in February 2026, then some £15 million or so further will be spent. In those circumstances, Mr Fleming expresses concern (see paragraph 20) that there might not be additional litigation funding to cover that extra expense.

40. Mr Fleming observes in paragraph 19 in particular that the current litigation funder has declined to provide any commitment in this respect, and I am not surprised by that. I do not necessarily accept that there will not be additional funding, and that is not indeed what Mr. Fleming says will be the case, but I can understand why he expresses the concern that he does.

41. He goes on to observe in paragraphs 22 and 23 of the same witness statement that, even if there were additional funding obtained, then it may be on increased terms.

42. Finally, Mr Fleming records in paragraph 24 how certain brief fees amounting to some £600,000 or so have already been incurred and will be lost in the event of an adjournment.

43. These are matters which, whilst not by themselves singularly significant, nonetheless, when weighed in the balance and allied with my conclusion that there would not be the unfairness that Mr. Plewman and Mr. Harrison suggest were the trial not to be adjourned, cause me to be further confirmed in my conclusion that the adjournment application should be dismissed.

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