IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
QUEEN'S BENCH DIVISION
[2022] EWHC 701 (TCC)

No. HT-2020-000465

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 25 February 2022

Before:

RECORDER ANDREW SINGER QC
(Sitting as a Judge of the Technology and Construction Court)

B E T W E E N :

MAYPOLE DOCK LIMITED — Claimant

- and -

CATALYST HOUSING LIMITED — Defendant

MS L. KUEHL appeared on behalf of the Claimant.

MR D. WOOLGAR appeared on behalf of the Defendant.

J U D G M E N T

(via Microsoft Teams)

(Please note this transcript has been prepared without access to documentation)

RECORDER ANDREW SINGER QC:

1 This is an application for security for costs. The matters which I am required to consider go to the court's unfettered discretion as to whether to order security or not because it is accepted as (a) it has been since the middle of November 2021 and (b) in my view, it would have had to have been accepted anyway on the clear evidence before me; that the claimant company passes what is sometimes described as the threshold test for allowing the court to consider the question of discretion, namely that there is a probable inability to repay the defendant's costs if the claim is dismissed and it becomes liable to pay those costs. As I have noted the evidence before me is very clear in any event as to the lack of assets in the claimant company. It is also, I am satisfied, very clear so far as the lack of assets of its shareholder and no doubt primary potential funder Mr Owen.

2 I should say that the application has been made by Mr Woolgar of counsel and resisted by Ms Kuehl of counsel. I have had very helpful and full skeleton arguments from both of them. I have had the opportunity to read them this morning and I had the opportunity to consider them further, and the evidence during the course of the hearing. I have taken everything into account in reaching my decision. Just because I do not mention anything now in this judgment should not be taken as being that I have not taken matters into account, merely that I do not think they require to be recited in the course of what is the course of an *ex tempore* relatively brief judgment on a discrete although ultimately perhaps very important point.

3 The background to the application is that the case itself brought by the claimant relates to an overage agreement in respect of the sale of land by the claimant to the defendant in 2014. The overage agreement is dated 4 April 2014 and the issue is whether the defendant was in breach of an obligation to seek to optimise the open market value of the land. It is common ground that the defendant made the planning application in April 2016 without seeking the claimant's prior consent although there is a dispute as to whether it had an obligation to do that. It is also accepted, as a matter of fact, of course, that in August 2017, the defendant obtained planning permission for a residential development composed entirely of low-density family sized social rented homes. The development costs exceeded the projected revenue and so there was a negative open market value and therefore no additional consideration pursuant to the overage agreement.

4 The claimant in the proceedings says the defendant breached the overage agreement and there has also been a claim for damages for breach of contract including damages for loss of a chance to receive additional payments and what are described as negotiating damages. The defendant denies breach and alleges, in any event, that planning permission would never have been obtained for a development that would have resulted in any overage actually being paid.

5 At this stage, it is convenient for me to refer to one of the factors which it is common ground is relevant on an application for security for costs which is whether the claim is *bona fide*. It is accepted that the claim is *bona fide* and is a reasonably arguable one. In her helpful submissions, Ms Kuehl sought, in effect, to persuade the court that the claim was more than just reasonably arguable, that it was very strong. Realistically, I think appropriately if I may say for the purposes of this application, Ms Kuehl did not backtrack from that but was prepared and accepts that for the purposes of today, the real question is whether the application was being brought in respect of a claim which had a real prospect of success and since Mr Woolgar quite properly accepted it did have a real prospect of success

and, most importantly, the claim was not in any way a sham, matters rested there. So I do accept that this is a reasonably arguable claim which obviously has real, as opposed to fanciful, prospects of success. If, therefore, the effect of an order for security for costs would be stifling what is a genuine claim as opposed to a fanciful or speculative one, then that would be a potentially important factor to take into account and I will come to that in my judgment in a little while.

6 Another factor that was relied upon in the skeleton but accepted, I think properly, as almost a circular one in terms of this application is whether the claimant's want of means have been brought about by the defendant's actions in one sense the claimant being a one project vehicle having made this claim where the one project vehicle says it has been left out of money. Then, in that sense, its want of means has been brought about by the defendant's conduct but only, of course, if the defendant's conduct is found at the end of the trial to be a breach of contract and to have caused loss. So, in a sense, in this case I think it is again realistically accepted that does not take matters very much further than the fact that the claim has real prospects of success and is not fanciful or a sham.

7 Two factors are relied upon heavily by Ms Kuehl in resisting an order for security but before I deal with those factors, it is important, it seems to me, to recite first of all the up-to-date evidence which the claimant relies upon in this application and also the background, as I see it, the real background of that evidence.In the statement from Mr Owens, who is the claimant's director, dated 18 February, he says under the heading "Consequences for MDL if security must be given" in the bundle at p.105 - 106, para.43:

> "As explained above, I believe MDL has a good claim against Catalyst and if it is able to bring its claim to trial, MDL is likely to succeed. However, the costs of these proceedings are now projected to be significantly higher than either party had anticipated before November 2021."

8 I pause there to point out that even by this stage in the middle of November 2021 it had been accepted that the threshold had been passed. At 44:

> "Therefore, even without being ordered to pay any security for Catalyst's costs, MDL is likely to find it difficult to continue to fund its own costs of this litigation without third party funding or after the event insurance. If MDL is ordered to pay security for Catalyst's costs, MDL will not be able to continue with these proceedings."

9 So as Mr Woolgar pointed out in respect of the evidence generally and as at that date, the claimant's own evidence was that even without being ordered to pay security, the claim was likely to be stifled without third party funding or after the event insurance and as at 18 February, that did not exist.

10 On 23 February, Mr Hartley, who is the claimant's solicitor, filed his fifth statement I, of course, accept the contents of that statement from a solicitor as being true. Paragraph 9 of that statement says:

> "9. I understand from discussions with funders that the likely premium for the ATE insurance policy and AAE to meet a security for costs order will be £61,600 inclusive of premium tax. This premium would apparently remain substantial whether security were ordered for £200,000 or £550,000. I was told that costs may be reduced by £10,000 or perhaps £20,000 but no more than that. Therefore, if ATE

> insurance and an AAE were purchased, the claimant would be left with £90,450 from the sum of £152,050 of funding to fund its own costs or trial. From that, the sum of £48,000 is likely to be required to mee the costs of the experts leaving only £31,920 for the hearing, mediators' fees, solicitors and counsel's fees, and disbursements. Unless the claimant is able to find solicitors and counsel who are prepared to take this matter on a full conditional fee arrangement (at present, no conditional fee arrangement is in place) the claim will have to be discontinued."
>
> 10. By contrast, if no security is ordered, the £152,000 would meet a significant proportion of the £258,195 excluding VAT of the claimant's estimated future costs (see the claimant's costs budget at p.228 of the bundle). In those circumstances, it would be much more likely that the claimant would be able to fund its claim all the way to trial and perhaps through a combination of my firm running the matter very efficiently, possibly some level of conditional fee agreement in respect of any difference between the claimant's actual costs, and the sum of £152,050 from a third-party funded by my firm and/or counsel."

11 There are then annexed to the statement exhibits which show emails between the parties' solicitors since 18 February 2022. There was some criticism, I think, made of that evidence but it does not seem to me to affect the position which is actually in my view clear, namely that, realistically, the claimant has been seeking to obtain litigation funding and to finance ATE insurance because the reality is that in cases like this, and as Mr Woolgar in my view correctly submitted, absent strong discretionary factors to the contrary, courts will normally seek to order impecunious company claimants to provide security for costs and since the middle of November, this claimant has accepted that it is within that category.

12 So in a sense, whilst of course that being entirely open to it to object to the making of an order for security and to identify discretionary grounds, openly in the background the claimant has been seeking to see if it can obtain ATE insurance to ward off the need for security and has been seeking the defendant's agreement to delaying this application today with a view to being able to produce a suitable policy whilst, at the same time, it says, "If we have to produce that policy, our claim will be stifled because it will take up too much of the third-party funding to allow us to proceed to trial without a conditional fee." So, in a sense, the court is faced with an almost Alice in Wonderland type of approach to the case because on the one hand it is being said that, "If we have to provide ATE cover for what we now hope to have by way of third-party funding that will stifle the claim but we have been trying to have ATE policy funding because we need it to provide security." That is often, it may be said, almost a cleft stick in which an impecunious claimant company finds itself but that is because the claimant company is impecunious but has nevertheless sought to bring these proceedings. It seems to me that when a claimant company brings proceedings knowing it is in a financially weak position, it also knows that there is a real chance that the defendant will seek security for its costs. It also knows that there is a very real chance in a commercial dispute like this - although this matter is in the TCC it is a business dispute - that the courts will consider seriously providing making an order for such security.

13 Fortunately, these days, security is not limited as it used to be to bank guarantees or huge sums of cash being put into the court's special reserve account. Nowadays, one of the ways in which security can be provided and it is accepted could properly be provided in this case is by appropriate insurance with the appropriate anti-avoidance endorsements. The

claimant, indeed, says at the moment, after Mr Harley's statement, it would be in a position to pay for that insurance, "But" it says, "on that basis, I cannot then at the moment afford to carry on the trial but I might be able to carry on to trial if I did not have to produce that security."

14 It seems to me that when a claimant says, as it does very ably if I may say via Ms Kuehl's submissions, that its claim is likely to be stifled if an award of security is made, nevertheless, the court has to look at the reality of the position. The reality of the position is irrespective of whether an order for security is made or not, I read a combination of Mr Owen's statement of 18 February and Mr Hartley's statement of 23 February as saying that the likelihood is that this claim is going to be stifled irrespective of whether an order for security for costs is being made. So it is not, in my view, appropriate to say that an order for security is of itself likely to stifle the continuance of this claim. What is most likely to stifle the continuance of this claim is the claimant's inability to either fund it itself or to find lawyers who will effectively agree to fund it on some form of contingency conditional fee arrangement. So I am not satisfied on the facts when you analyse the statements rather than simply looking at what is asserted in the statements, that the claim is likely to be stifled by an order for security.

15 If I were satisfied that it was likely to be stifled, nevertheless, it seems to me bearing in mind that that is a discretionary factor and although it is an important one as is made clear in the *Spy Academy* case at [19],- it is not determinative but it is a powerful factor in the claimant's favour. Nevertheless, despite the fact it is a powerful factor and would be a powerful factor if it existed it does not seem to me to be determinative of this case and especially in a case where despite the fact that it is a reasonably arguable claim it is not an open and shut case. So it is not said and it cannot be said that the claimant is being barred from the judgment seat on what would otherwise be, to use an analogy, some sort of rubber stamp decision on the part of the court. There are clearly very significant issues as to liability but even more importantly as to causation and as to quantum which need to be determined and which are dependent on expert evidence which will not be produced until June 2022.

16 So I am not satisfied on the evidence that taking the test that it needs to be shown by a third-party making the allegation, namely the claimant, that an order is likely to stifle proceedings. I am not satisfied that an order is likely to stifle proceedings. I am satisfied, in fact, that what is most likely to stifle the proceedings irrespective of whether an order is made or not is whether the claimant can fund the litigation going forward itself or with the assistance of others. So I am not going to exercise my discretion to refuse an order for security on that base.

17 That leads to the next point which was, again, forcefully and persuasively made by Ms Kuehl which is as to delay. Although I accept that there has been delay in bringing this application, that said, it has not been undue delay but there has been a good deal of delay and there has also been a good deal of procedural posturing which has preceded the case management conference in this matter and which is entirely the choice of the defendant. I am not criticising the defendant for making that choice but the defendant had the choice made applications when it could quite probably have made an application for security for costs at an earlier stage based on, at that stage, an assessment of what its costs were likely to be. True it is that now we know what those costs are likely to be because there is an approved budget for costs going forward and we know what costs were incurred as at the case management conference on 25 November but, nevertheless, there was not actually anything stopping the defendant from making an application for security for costs earlier than November 2021.

18 Whilst, therefore, it does not seem to me that that application is so late as to amount to a reason for refusing to exercise discretion at all, and I have taken on board the points that were made in relation to the decision of Mr Millett QC in what has been described as the *Bennett* case, particularly at [28] that "delay in making an application is one of the circumstances of which the court will have regard when exercising its discretion to order security. A court may refuse to order security where delay has deprived the claimant of the time to collect the security or led the claimant to act to his detriment or may cause hardship in the future costs. The court may deprive a Claimant for security for some or all of his past costs or restrict security to future costs."

19 The question of delay must be assessed at the moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because as the Court of Appeal said in the *Prince Radu* case, the order for security comes with a sanction which gives the claimant a choice whether to put security or to go on or withdraw his claim. It is meant to be a proper choice and the claimant is to have a generous time with which to comply with it. The making of an order for security is not intended to be a weapon whereby a defendant can obtain a speedy summary judgment without a trial. The master took account of delay in the case before Mr Millett QC. She relied on two specific periods of delay and she, in her discretion, refused to grant security. Because the case before Mr Millett was an appeal, he felt in the exercise of his appellate capacity, he could not allow that appeal although there was another reason that the master relied upon in the original hearing for not granting security which he found was wrong. Nevertheless, he found that that reason, of itself, was well-founded enough for him not to interfere with it.

20 So first of all, I am not in the position that Mr Millett QC was in because I am the first instance judge. Secondly, I do not find and nor was it said to me that the delay has deprived the claimant of the time to collect the security or led it to act to its detriment. It may cause hardship in the future costs of the action. Of course, it may cause hardship in a stifling sense but I have already dealt with that and said that that is not, in fact, a proper matter to rely upon as a factor.

21 So it does seem to me that the delay has been, in my view, properly complained about. The application was brought after the CCMC, after a significant amount of interim skirmishing and it could have been brought up earlier. It does seem to me that there is properly some complaint to be made of that delay but not to the extent of saying that security should not be ordered at all. I do also consider and I decide, in the exercise of my discretion, that security should be provided but only for costs going forward from the date of the CCMC.

22 Mr Woolgar says, rightly, that that is not going to make a lot of difference on the stifling point because the costs of the ATE are not very different whether you have all of the costs or most of them, and that is right. However, the question for me, as Mr Woolgar also rightly accepted, is whether it is just to make an order and it needs to be just to make an order in a just amount. It seems to me specifically since the rules allow a court to do this that it is right to deprive, effectively, the defendant of security for some of its costs, namely of costs which have been incurred to date and that is what I propose to do.

23 So drawing all these matters together, it seems to me that the threshold having been clearly accepted as being made out that factors relied upon forcibly but, in my view, not made out by the claimant, namely stifling, does not lead me to exercise my discretion against ordering security. Delay leads me to exercise my discretion against ordering security for the whole of the defendant's costs but I will order security to be provided for the entirety of the costs going forwards, in other words, those costs which are now either approved or agreed in the

budget which are in a figure of something approaching £334,000 or thereabouts. That security can be provided by means of an ATE policy and I am going to allow the claimant twenty-eight days to provide that appropriate security. In due course, I am going to ask the parties to draw up an order.

24 So my order is that the claimant does provide security for the defendant's costs as approved so far as estimated costs are concerned, appropriate security to be provided within twenty-eight days of today. Such appropriate security can include an ATE policy with an anti-avoidance endorsement.

L A T E R

25 I am not going to order a stay where the party seeking security has not asked for one, Ms Kuehl. As far as timing is concerned, I am afraid I am going to stick to twenty-eight days. It does seem to me in the light of your client's evidence, your solicitor's evidence, and the issue of how your client is going to fund the matter going forward for itself, irrespective of the VAT policy, that a decision needs to be made sooner rather than later. I was allowing a little more time than Mr Woolgar had asked on that basis. If you get to twenty-eight days and you are three days away from an ATE policy being produced, no doubt sense will prevail. Mr Woolgar is not asking for there to be any sanction that applies after those twenty-eight days and will have to come back. So I am afraid twenty-eight days it is.

L A T E R

26 It seems to me that there actually was not an open offer to provide anything and even as at 23 February, I read and I think Ms Kuehl submitted to me that her evidence was that an order should not be made at all. Having fought her application on the basis that an order should not be made at all, Ms Kuehl then says, "The order that was made was one we had offered to make." Clearly, they had not done that at all. They had said that no order should be made and so the application was fought and was lost, and costs follow the event in the usual way. What is more, it does not on my reading of it in any way seem to me to have been any offer that the defendant could have accepted before today because there was not a formulated offer at all.

27 So I am afraid it does seem to me that the absolute reality of the position is that the claimant fought this application and then lost it, and since the opposition to paying the costs is that the claimant says, "Actually, I won it despite the fact that I had an order made against me that I have just argued I should not have had", it does not seem to me why there is any other reason why there should not be the usual order made, in principle, subject to quantum. So the claimant will pay the defendant's costs of the application which unless anyone tells me otherwise I am going to summarily assess now.

L A T E R

28 I am going to summarily assess costs in the sum of £22,054.85. That needs to be paid as well within the twenty-eight-day period. So obviously the claimant has a choice whether to pay that sum or not within that time and if it does, so be it, and if it does not, then the defendant can come back to court and seek to enforce that.

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This transcript has been approved by the Judge.