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Case No: CR-2018-010300

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
(VIA SKYPE)

Date: Thursday, 26th March 2020

Before:

INSOLVENCY AND COMPANIES COURT JUDGE JONES

IN THE MATTER OF SMITH TECHNOLOGIES LIMITED (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

(1) MUSTAFA ABDULALI
(2) NEIL DINGLEY
(JOINT LIQUIDATORS OF SMITH
TECHNOLOGIES LIMITED
(IN LIQUIDATION))
(3) SMITH TECHNOLOGIES LIMITED
(IN LIQUIDATION)

**Applicants/
Liquidators**

- and -

(1) NICHOLAS STEPHEN PEARSON
(2) ROBIN JAMES DERMOT MACKIE

Respondents

MS. HILARY STONEFROST (instructed by **Collyer Bristow LLP**) appeared for the
Applicants/Liquidators.

MS. ELEANOR TEMPLE (instructing by **Lupton Fawcett LLP**) appeared for the
Respondents.

APPROVED JUDGMENT

Transcript of the Stenographic Notes of Marten Walsh Cherer Ltd.,
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ICC JUDGE JONES:

1. Until today, this was not an application to adjourn on the basis of a respondent's individual medical grounds, but an application resulting from the consequences of self-isolation in accordance with the Government's guidelines. I am going to say right from the beginning of my judgment that I do not treat this request for an adjournment as part of a deliberate plan. I will, however, have criticisms to make, which indicate a concern that grounds have been put to justify an adjournment that really do not have merit and indicate a lack of positive steps having been taken to overcome potential problems. On the other hand, I do not want the word "concern" to be taken out of context because it has to be recognised that we are in an exceptional situation and one which has been changing rapidly, day-by-day, in the context of court procedure, protocols and expectations.
2. I have looked at the CE file to ascertain the general nature of the case. I think it is important to bear in mind, which I do, that this is a money claim that does not require an urgent remedy. It is a not very substantial claim in terms of size for the Business and Property Courts, although far from insignificant and of considerable concern to the respondents. It is not especially complex for this Court. Nevertheless, it is a trial listed for five days, requiring witnesses, and not insubstantial bundles.
3. I obviously will proceed to make my decision on the basis that the trial must be fair and injustice must be avoided. I must also bear in mind the recent judgment of Teare J. It provides guidance, guidance from the senior Commercial Court judge. It also follows the pronouncements of the Lord Chief Justice. The points they have emphasised are that the courts exist to resolve disputes. The default position is that trials will be conducted remotely. It is the duty of all parties to seek to co-operate to try and achieve that result.
4. There should be, in principle, no difficulty setting up a remote trial and any difficulties that might arise should normally be capable of being worked through in the period leading up to and/or during the hearing. It is key that the trial can be recorded, but that should be achievable and there is a new Practice Direction. There is no doubt that we are all learning how best to use this technology. However, overall, the technology is not difficult to apply and it is a feature that an advantage of it is that time is not such a relevant factor to the trial and there is greater flexibility now travel is irrelevant.
5. In reaching my decision, I need to take account of the fact there is a protocol of 20th March, and I also need to have regard to the overriding objective, taking into consideration, amongst other matters, the effect of backlog if trials are adjourned.
6. That sets the scene and explains why I have taken an approach when hearing submissions that we must try and get this trial going if possible.
7. The adjournment is sought in the context of serious concern about the ability of the respondents to give and receive instructions because of the different locations of counsel, solicitors and clients. Also, because of self-isolation itself with one of the respondents coming within a vulnerable category. However, I do not see that location and self-isolation should, in principle, lead to communication problems. I take the view that instructions can be taken without anyone hearing them during the trial, using mute on Skype and mobile phones, either directly or through apps. Indeed, visual

communication can be maintained. Whilst self-isolation and vulnerability are, of course, important, the whole reason for remote hearings is to achieve self-isolation protection. Remote hearings, as such, should not present a problem.

8. It has been contended that the legal team for the respondents has no previous experience and there is insufficient time to learn to be able to participate fully and fairly. Bluntly, that is not good enough. Solicitors are going to have to act quickly. They need to practise Skype and put in place procedures to enable them to be effective trial lawyers. I have to observe that it is highly surprising that the technology available to a firm of solicitors is not more advanced than that available to the courts, but again I return to the fact that this is not difficult technology. Nor should it be difficult to organise an electronically presented defence.
9. It is observed that the proceedings are “documentary-centric”. I appreciate that it is not necessarily easy to use electronic bundles. I also appreciate the need to ensure that not just the lawyers, but most importantly the parties themselves and their witnesses are able to use them. I do, however, think that this can be organised with the assistance of the lawyers and with appropriate directions that can be given for the purposes of the trial. It seems to me that a trial can be managed so that everyone will be at ease during the hearing and able to follow what is occurring. Again, I repeat the benefit of having the additional time that remote access in fact makes available to everybody to achieve that.
10. It has then been observed that there are no hardcopy bundles, but I really do not understand the problem with that when electronic bundles have been available since Monday.
11. Observations have been made about the clients not having adequate appropriate space and indeed solicitors not having sufficient space. I think one has to be realistic about space. I find it very difficult to accept that there will not be space to follow the trial and give instructions by phone, subject to individual circumstances concerning families and individual accommodation, et cetera, which I will come to now.
12. Mr. Pearson, as I understand it, has poor internet connection. That is plainly a matter that needs to be resolved together with the question of his ability to use his mobile phone. Again, I do not anticipate that those matters cannot be resolved. For example, one can easily enter contractual arrangements to obtain a short-term good internet connection and I am sure that can be done whether through businesses such “my wi-fi”, BT or others. I will be surprised if solicitors cannot assist whether by providing equipment or guidance.
13. In so far as family difficulties/space problems arise in practice, co-operation will enable the parties to discuss a special trial timetable with considerable flexibility to allow those problems to be dealt with. The Court will be willing to provide case management directions.
14. I mentioned at the beginning of this application the proposals that I already had in mind: namely, the opening of both sides, if the respondents wish to, being pre-recorded and sent before the opening of the trial to the other side. The openings should identify key documents and there should be a litigant friendly list of issues. This will assist the

litigants, presumably in liaison with their solicitors, to prepare for a remote hearing and be familiar with the electronic bundle.

15. I also mentioned that the cross-examination by the respondents of the insolvency practitioners can take place on the basis that I fully accept that they do not have to put their case to the applicants. That is because the applicants are relying on hearsay.
16. The required cross-examination of witnesses can be spread out over the day in so far as necessary. For example, there can be longer breaks than usual to allow for child care or it can even occur after childrens' bed-times (potentially and only if necessary!). Finally, I really cannot see any difficulty for closing submissions. There are many options.
17. I do note, again, that the point of the duty to co-operate is that the parties have to try to work round the problems. Of course, I have particular concern about young children being in the house and "getting unintentionally involved". I emphasise that I would not allow a trial to go ahead on the basis that counsel, solicitors or indeed any other party will be required to travel contrary to the government's guidelines. I am satisfied, however, from this hearing, and I need not go into this in personal detail, that the measures that can be put in place will alleviate the problems that young children can cause. I am satisfied that through discussion between counsel/solicitors, we can achieve the appropriate measures. I do not see that there will be an equality of arms problem but should it arise at any stage during the trial, I will resolve it. Case management can ensure it does not arise or, at least, it is solved.
18. There is an interesting issue, which now I think becomes academic because of the approach I have taken to case management, as to whether counsel can rely upon their personal commitment/problems, having accepted a brief. At the moment, I favour the analysis that counsel is to decide whether to accept or to return the brief if problems mean they cannot fulfil the brief. The court would then need to address whether the trial can go ahead in those circumstances; but that is not the position before me.
19. I am in a situation where counsel has accepted the brief. I wish to make clear, however, that this is not to suggest that either counsel has raised any personal difficulties which they should not have mentioned or has sought to rely on any personal matter to achieve an adjournment when they should not. They are both experienced practitioners and have behaved accordingly within the best traditions of the Bar.
20. The matters I have so far addressed would have led me to the decision that the trial should go ahead subject to case management directions. I may well have decided that the directions would be that the trial need not start until Thursday, subject to the pre-recorded openings I have mentioned. Discussions concerning the time required for the trial have led to that possibility.
21. It seems to me that whether I adjourn now turns on the question of the ill-health of Mr. Mackie. There is a witness statement from his solicitors which, I think it is fair to observe, for the first time identifies the potential seriousness of his condition. Normally, I would not allow an adjournment until I have seen medical evidence addressing ability to take part in the trial and proving a prognosis. In this case, plainly, that is not practicable. I have read the witness statement describing his position, but I think it is very fair to say that I cannot assess whether Mr. Mackie is going to be ready

or not to start giving proper instructions next week. He may well be in reasonable health to take an active part whilst continuing to self-isolate but he may not. It depends upon the seriousness of the virus which he apparently has.

22. I think that he will need to be able to reasonably communicate with his solicitors from Monday onwards even if the trial does not start until Thursday. If this trial is to proceed, I think the appropriate course, to be fair to both sides, is for me to know what his medical condition is on Monday. I certainly do not require him to provide a witness statement in that regard, but I think that the solicitors should be in contact with him over tomorrow and the weekend so that they can inform the court of the position, through counsel, or obviously, if they wish, by a witness statement. I anticipate that if they (if I can use the word) "only" proceed via counsel to inform the court, that the other side will require a subsequent witness statement to substantiate the information. I would not see a difficulty with that being provided during the week. However, I will base my decision on what the solicitors tell me through counsel or directly without needing a statement.
23. I have borne in mind the concern that this might lead to pressure upon Mr. Mackie whilst he is in an ill condition. I have decided that it certainly should not, because he knows that if he is ill and unable to participate, the solicitors merely have to explain to me that position on the Monday.
24. I will not define precisely what must be said because it will be a matter for common sense. If Mr Mackie is not capable of giving them instructions, for example because he has a fever or cannot speak, or he has headaches causing him to be unable to participate, I will act accordingly, as I have indicated. I will not be reaching a decision on his medical condition, for which there will be no medical evidence. It will be a question of whether the solicitors upon enquiry are able to take instructions from him on the basis that he can participate and will be able to do so during the trial. So, I really do not see that there will be any pressure upon him.
25. I will, therefore, adjourn this application to the Monday. I am not entirely convinced we need to have a Skype hearing for that, or whether it can be done by e-mail, but I am more than happy to leave that to the parties. I can be notified of their views and, if necessary, make a decision tomorrow. If there is not agreement, and one side wants it by Skype, then I will certainly hear it by Skype. I will, again, place, if I may, the onus on the solicitors to set it up. Since it is my reading day on Monday, I do not think there is going to be any difficulty for timing for me. I also ask the parties to consider whether if there is to be an adjourned hearing, it can be heard during the week of Easter Monday. I am willing to sit bearing in mind that no-one will be going on holiday during that vacation.

Order Accordingly
