Debarring sanctions to compel compliance with outstanding monetary Court Orders – *Zumax Nigeria Limited v First City Monument Bank Plc* [2020] EWHC 1852(Ch)

Quadrant CHAMBERS

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On 14 July 2020 the High Court (Miles J) handed down the latest judgment in the long-running ***Zumax v First City Monument Bank*** litigation - granting an "unless order" against Zumax to compel compliance with an order of the Court of Appeal, as the price to be paid for further participation in the litigation.

The proceedings relate to historic bank transfers in 2000-2002, performed via correspondent bank accounts- i.e., by paying funds into accounts held by the defendant bank with a further "correspondent" bank, for onward credit to the ultimate recipient. Proceedings were issued in 2013, claiming proprietary remedies on the basis that the Bank was a trustee or constructive trustee of the funds. Summary judgment was entered on this basis in November 2017 (Barling J); but under a new legal team led by Poonam Melwani QC of Quadrant Chambers, the Bank had this overturned by the Court of Appeal on 13 February 2019. As we reported at the time, the Court of Appeal comprehensively rejected the "trust" analysis, holding that any claims against the Bank would be personal claims only, and that Zumax would need to seek permission to amend its Particulars of Claim in the action if it wished to pursue personal remedies.

The Court of Appeal also ordered the return of the judgment sum, which had been released to Zumax from funds in Court shortly prior to the appeal hearing, and also ordered certain payments on account of costs.

However, more than 14 months later, the vast majority of the amount ordered to be repaid remained outstanding. The total outstanding amounts to more than £3.5 million, plus interest accruing from April 2019 onwards.

Further, having unsuccessfully sought to appeal the Court of Appeal judgment to the Supreme Court on the constructive trust issue, Zumax also now sought to re-amend its Particulars of Claim in the action to advance new causes of action in debt, restitution, breach of contract, tort, and breach of fiduciary obligations.

The Bank therefore sought an "unless" order to compel compliance with Zumax's long outstanding payment/repayment obligations under the Court of Appeal Order. The Bank also opposed any further amendments being made unless/until Zumax's obligations under the Court of Appeal's order were satisfied. (The Bank also resists the proposed amendments on freestanding grounds including limitation, which are yet to be decided).

At the Bank's invitation, the Court determined its application on the basis of an assumption most generous to Zumax and least favourable itself- namely, that Zumax would be granted permission to amend in due course. Even on that assumption, the Court was persuaded that it was appropriate to attach a condition to the Court of Appeal's order to compel compliance. The proceedings will therefore stand struck out unless Zumax complies with its outstanding payment obligations within four weeks from Miles J's order.

The decision of Miles J was an exercise of the Court's inherent jurisdiction, which arises wherever a party wishes to commence or continue proceedings whilst in breach of outstanding Court orders. The applicable principles were summarised in ***Global Torch v Apex Global Management*** [2014] 1 WLR 4495; ***Michael Wilson & Partners v Sinclair*** [2017] EWHC 2424 (Comm) in the context of compliance with outstanding costs orders as a condition of continuing to participate in litigation; and ***Hangar 8 Management v Talaveras Group*** [2019] EWHC 2483 (Comm) in the context of compliance with a monetary summary judgment as a condition of continuing to participate in the remainder of the proceedings. In particular:

(i) The Court keeps in mind the policy behind the making of orders in ongoing proceedings and the discouragement of irresponsible conduct;

(ii) The Court gives consideration to all relevant circumstances, including the availability of alternative means of enforcement of the order, and any submissions made by the party in breach at the time the order was made (e.g. along lines that the order should not be made or should not be immediately payable);

(iii) A plea of impecuniosity by the party in breach must be supported by "detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash reserves are insufficient to meet the liability";

(iv) Where the defaulting party has no or insufficient assets within the jurisdiction, but has not discharged the heavy onus of demonstrating impecuniosity per (iii) above, then the unless order should normally be made as the price for being allowed to continue to participate in the proceedings;

(v) If the Court decides a debarring order should be made, this should be an unless order save where there are strong reasons for imposing an immediate order;

(vi) The underlying merits of the parties' cases are generally irrelevant- unless it can be quickly and readily shown that the party in default would be entitled to summary judgment on its case.

The starting point was, rightly, that the Court's orders are there to be complied with and, if necessary, enforced with appropriate sanctions. Zumax had not submitted to the Court of Appeal that it would be unable to repay the Judgment sum at the time the Court of Appeal's order was made, and indeed had itself only received the judgment sum a few months previously against very specific evidence as to how it said it intended to use the money.

As in many such cases, however, the debate largely centred on whether Zumax could demonstrate that it was impecunious and unable to pay the outstanding amounts, such that the imposition of sanctions would stifle its claim. On this topic the Court derived the following further principles from the well-known Supreme Court decision in ***Re Goldtrail Travel Limited*** [2017] 1 WLR 3014:

"(a) It is wrong to impose a condition which would have the effect of preventing a party (R) bringing, continuing, or defending a claim.

(b) Where R argues that it will not be able to comply with a sanction and will therefore be deprived of access to justice the burden is on it to establish this on the balance of probabilities.

(c) Even where R appears to have no realisable assets of its own with which to satisfy the proposed condition, that condition will not stifle the claim if R can raise the required sum.

(d) Where R is a company, the Court must keep at the forefront of the analysis that it is a distinct legal personality from its shareholders. The question is whether R can establish on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition."

Zumax failed to establish the heavy onus of demonstrating impecuniosity. For example:

(i) There was little hard evidence about Zumax's own financial position and a number of unexplained gaps in the evidence on this - for example no details were provided as to how Zumax was funding the ongoing litigation including for example an unsuccessful application for permission to appeal to the Supreme Court.

(ii) Zumax had received payment of the judgment sum shortly before the appeal was heard, and promptly paid this away to corporate affiliates ("Cosmopolitan" and "Kasa"). However, there was no evidence as to what had became of the money after it had been paid to them. Cosmopolitan's majority shareholder was also a shareholder/director of Zumax ("Mr Nduka-Eze").

(iii) The evidence suggested that Mr Nduka-Eze was a man of means- for example being a member of exclusive Mayfair Clubs with substantial annual membership fees, and being the freehold owner of a 30-hectare property in Nigeria which he said was conservatively valued at $5.5 million.

(iv) The evidence also revealed that Zumax had received informal lending over the years from Cosmopolitan and Kasa, who remained willing sources of funding to Zumax going forward. However, there was scant evidence as to the means of these willing backers- albeit the evidence showed that Cosmopolitan remained actively involved in successful property development.

(v) The Judge therefore found there was "evidence suggesting that Cosmopolitan is a substantial business and that Mr Nduka-Eze is a reasonably wealthy man but the evidence about his assets is exiguous. Cosmopolitan and Kasa were able and willing to provide Zumax with funding until 2018 and there is no reason, given the evidence, to conclude that they would not be able to provide similar funding now." [128]

The overall conclusion on impecuniosity was therefore that "The burden of showing that it will be denied justice if the Court of Appeal's order is enforced by a sanction is on Zumax. The Court is entitled, indeed required, to scrutinise the evidence with a careful eye and to draw adverse inferences from obvious gaps (of which there are many). Zumax has failed to persuade me on the balance of probabilities that it will be unable to pay the amount owing under the Court of Appeal order if a debarring sanction is imposed." [129].

The case serves as a salutary reminder that Court orders are expected to be complied with, and that the Court can and will make orders to compel compliance in appropriate cases- including debarring litigants from further participation in ongoing proceedings. The burden on those seeking to establish that such an order would have a stifling effect is a heavy one, which can only be discharged by detailed and cogent evidence which comes clean as to the means and sources of funding available to the defaulting party.

Poonam Melwani QC and Paul Henton acted for the successful bank, instructed by Andrew Preston and Harriet Thornton at Preston Turnbull LLP.

Poonam Melwani QC

"She is robust and rigorous in her preparation and she manages to combine this with a very personable approach." (Legal 500 UK, 2020)

Poonam Melwani QC is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as "...always in demand, she is as good on her feet as she is adept at mastering complex legal, factual and expert material...." (Chambers UK), Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories.

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Paul Henton

"A fantastic junior who really gets into the detail." (Legal 500 UK, 2020)

Paul is an experienced Commercial practitioner recommended in the directories in four distinct practice areas: Shipping, Energy, Commodities/International Trade, and Aviation. Paul has been instructed at all levels of the Court system, including the Court of Appeal, Privy Council and Supreme Court.

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