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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1258/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28 June 2016

Before:

THE HON. MR. JUSTICE ROTH
(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UKRS TRAINING LIMITED

Applicant

- and -

NSAR LIMITED

Respondent

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Mr. Tristan Jones (instructed by Berkeley Square Solicitors Ltd) appeared on behalf of the Applicant.

Mr. Gordon Wignall (instructed by Greenwoods Solicitors) appeared on behalf of the Respondent.

INJUNCTION APPLICATION

1 THE PRESIDENT: Yes, Mr. Jones.

2 MR. JONES: Sir, I appear for the applicant, and my learned friend, Mr. Wignall, appears for the
3 respondent.

4 THE PRESIDENT: Yes.

5 MR. JONES: Sir, you will, I hope, have seen that agreement has been reached between the
6 parties----

7 THE PRESIDENT: Yes.

8 MR. JONES: --essentially that today's hearing should result in an order suspending or lifting the
9 suspension pending a further interim hearing of our application. There is a draft----

10 THE PRESIDENT: Order or an undertaking?

11 MR. JONES: An order setting directions for that hearing, and an undertaking----

12 THE PRESIDENT: An undertaking not to enforce the suspension, I think.

13 MR. JONES: Yes, Sir, and there is some question about the precise wording of that undertaking,
14 which my learned friend will address you on, there is no dispute about that, but the precise
15 wording of the undertaking has changed slightly since the draft which you will have
16 received.

17 I should hand up the latest draft prepared by my learned friend, which is broadly agreed,
18 except I will take you through it to raise a few points. (Same handed)

19 THE PRESIDENT: Before you do that, or while it is coming up, I have had the application and a
20 draft witness statement from Mr. Bowen. Has that now been signed and attested?

21 MR. JONES: It has not, Sir, so we will plainly need to do that as soon as possible. I should also
22 say in that regard that one thing that is missing from that is the evidence as to the
23 undertaking which my client might ultimately be required to give.

24 THE PRESIDENT: Yes, but you are not being asked for that at the moment.

25 MR. JONES: We are not being asked for that but we do intend to put that out. The suggestion in
26 a letter from the Registry is that I would address you orally, but since this is coming back
27 for a further hearing it seems sensible, actually, to put in a short statement just addressing
28 that so that we can also evidence it fully. That is not in the order – it could go in the order,
29 but it need not, it is our intention.

30 THE PRESIDENT: Yes.

31 MR. JONES: The order that you have before you, as I say, is broadly agreed. There are a couple
32 of minor points. If you look on the first page there is a misspelling in the second recital of
33 my client's name, it is Sion, so we need to correct that obviously. The undertaking needs
34 tweaking slightly but my learned friend will explain that to you.

1 THE PRESIDENT: Just a moment, let me read it. (After a pause) Yes, it starts on the day
2 following the hearing or such other date as the Tribunal by its order may permit. That is
3 what it says.

4 MR. JONES: It may be, Sir, that I should just pick this up now, since I think the wording is
5 agreed, rather than leave it to my learned friend. Where one sees the appeal letter dated 17th
6 June 2016, my learned friend wants to add there, and we accept, this wording: “and in order
7 to effect this to postpone the period of suspension so that the remainder of the period starts”,
8 and then it picks up again, so we are going back to the typed text which you have we would
9 be deleting the words “the commencement of the period for suspension being postponed so
10 that it starts”, so that would be deleted, and then picking up again: “On the day following
11 the hearing or such other date as the Tribunal by its order may permit”.

12 THE PRESIDENT: Yes.

13 MR. JONES: So the intention behind the undertaking is to make clear that the remainder of the
14 period of the suspension will pick up again after the next hearing if that is what the Tribunal
15 decides, and that this two or three week delay will not, as it were, eat a chunk out of the
16 suspension, in other words there will be a three months suspension, so we are agreed on
17 that.

18 THE PRESIDENT: Yes.

19 MR. JONES: Then one has the orders. There is a dispute about the first----

20 THE PRESIDENT: Before we get to that one, what is the position about forum. There is going
21 to be a claim form, is it accepted the forum is England and Wales, that the proceedings are
22 to be treated as being in England and Wales for the purposes of the Rules?

23 MR. JONES: I have not discussed that with my learned friend. I do not, myself, see how there
24 could be any dispute, but I have not discussed that.

25 THE PRESIDENT: It is important because of jurisdiction I would have thought that it would
26 appear to be England and Wales as opposed to Scotland, but it is something we should
27 agree. Is that accepted.

28 MR. WIGNALL: Would you just give me a moment?

29 THE PRESIDENT: Yes.

30 MR. JONES: For our part, you may have seen that is, in fact, what we said on our application
31 that it should be treated as England and Wales.

32 MR. WIGNALL: (After a pause) I am sorry I have not discussed this with my learned friend, but
33 I understand the regulated activities do have an effect in Scotland, but for the purpose of
34 this dispute then the jurisdiction, we suggest, should be England and Wales.

1 THE PRESIDENT: Yes, it has to be one or the other, it cannot be both. A lot of our cases are
2 Pan-UK but I would have thought that is right, and I think that can be incorporated, that the
3 proceedings to be commenced shall be treated pursuant to Rules 52 and 18 as being in
4 England and Wales.

5 Then you are going to undertake – that is an undertaking by you, is it, to sign and serve the
6 witness statement?

7 MR. JONES: The witness statement, we can make that an undertaking.

8 THE PRESIDENT: That can be an undertaking to sign and serve by, what?

9 MR. JONES: Sir, can I take instructions? I think it is just a case of getting the signature on the
10 paper. (After a pause) Thursday 5 o'clock – he is in Birmingham, so it may be that there is
11 a----

12 THE PRESIDENT: By 4 o'clock, Thursday is the 30th, but it will be in the form of the draft?

13 MR. JONES: It will, Sir.

14 THE PRESIDENT: That is all right, in the form of the draft presently before the Tribunal. The
15 claim form, is that agreed, the 4th? That is what the draft you handed up says, the 4th July.

16 MR. JONES: If there is to be a claim form, there is a dispute about this.

17 THE PRESIDENT: There has to be a claim form.

18 MR. JONES: This is where the dispute arises.

19 THE PRESIDENT: Yes.

20 MR. JONES: Under the Rules there has to be a claim form unless the matter is urgent, and that is
21 Rule 68.

22 THE PRESIDENT: So urgent that you need your injunction before you can have time to produce
23 a claim form.

24 MR. JONES: That is right.

25 THE PRESIDENT: That would have been the position today if there had been no agreement to
26 give an undertaking.

27 MR. JONES: I accept that, and the only question is over the precise timing of this. The first
28 point, and I accept that this does not go to urgency except by way of background, but the
29 first point I would make is that we have, we consider, set out our claim in a way which is
30 perfectly understandable in the application document and the skeleton argument. What we
31 certainly could do, and have offered to do, is produce on this timetable, if it is considered
32 appropriate and necessary, we could produce a draft claim form by that date. It is a fall
33 back in the sense that, as I have said, it does not appear to us to be necessary because that
34 draft claim form really would not add anything to what has already been said. The reason I

1 say “draft” is that prior to issuing a final claim form, we would wish to have an opportunity
2 if so advised, to take economic advice on a couple of points of detail which may ultimately
3 well be immaterial to the precise form of the claim, but if I give you one straightforward
4 example: the geographic market, which we have defined as Britain, we have not in the time
5 available had a chance to look into the position, for instance, in Northern Ireland and
6 whether Network Rail covers that. So is it Britain or is it the United Kingdom? One would
7 want to look into things.

8 Sir, I accept that we could produce, as it were, a final claim form but it would then be
9 subject to that caveat, that it may require amendment. As I have said, it does not seem to us
10 to be a necessary step in circumstances where we have already set out the claim.

11 THE PRESIDENT: Except that it may be that the respondent would say that one can see on this
12 claim form that it gives rise to no cause of action, or they want summary judgment, and they
13 could make such a cross-application. They cannot really do that if there is no claim. The
14 provision about seeking an injunction before a claim form is when it is so urgent that there
15 just is not the time to do that. As I say, that would have been the position if today needed
16 an injunction if the respondent had not acted, if I may say so, responsibly in offering an
17 undertaking. You could not be criticised for not giving a couple of days’ notice for the
18 claim form, but as this is coming back in a couple of weeks there is ample time to do that,
19 and even, I would have thought, to have an initial consultation with an economist. I accept
20 you might need to amend, and you may say your pleading will be the best particulars you
21 can give as to the relevant market.

22 MR. JONES: Sir, all of that I accept, and that is why I said it really depends on what approach
23 one adopts to urgency and a timetable generally. If we were to be required to produce a
24 final claim form, it would, in my submission, be more appropriate to give us a little longer
25 to do that so that we do not have to face the prospect then of amending, and there is an
26 opportunity to have economic input before that. In that sense, if we are tied to the timetable
27 which has been proposed, then I would say it is urgent within the Rules, because in that
28 timetable it still would not be appropriate for us to have to produce a final claim form. We
29 have offered a draft claim form in that timeframe. If, on the other hand, it needs to be a
30 final claim form, we would request a little longer to put all of that together.

31 THE PRESIDENT: What would you have in mind?

32 MR. JONES: The end of next week, Sir, for the claim form. The 4th, which is currently
33 suggested, is the Monday, and we would then say the Friday.

34 THE PRESIDENT: Yes, 8th July. These are agreed dates, are they, 6th July?

1 MR. JONES: The gaps, as it were, between them are agreed. Obviously, if it was the 8th for
2 number 1, then instead of the 6th on number 2 it would be the Tuesday following.

3 THE PRESIDENT: I do not know. It does not necessarily follow, because the evidence may not
4 go to the legal - just using the claim form, I do not know. I will hear from your opponent on
5 that. You are envisaging that there be a hearing some time later the following week - is that
6 right?

7 MR. JONES: Sir, yes, but just before we get to that I should say there has been agreement to add
8 another point after 2 to allow for evidence in reply. That would be two days after
9 whichever date is given for point 2.

10 THE PRESIDENT: Yes.

11 MR. JONES: Then the hearing would be shortly after that. Sir, I should confess, this particular
12 draft of the order was only handed to me just as I came in, and what I had previously seen
13 said that the hearing would be on a date to be agreed. We are very happy with this, I just
14 have not had a minute since I saw it to look at my diary.

15 THE PRESIDENT: I think we should fix the hearing.

16 MR. JONES: Sir, that does concern us, and I will look at that.

17 THE PRESIDENT: That should be what the parties are happy with, and it has got to be heard by,
18 in terms of the Tribunal's availability, 26th July at the latest. It can be the week before. It
19 may be that the week before would fit. It seems to me that it is sensible that you should
20 have a claim form pleaded. I think that is what Mr. Wignall is asking for, is it not/ Your
21 position is that there should be a claim form, is it?

22 MR. WIGNALL: Yes, of course. Sir, if my learned friend says that he can supply a proper claim
23 form by the 8th, then we are quite content.

24 THE PRESIDENT: I think that is sensible. It is far better to have a claim form, so that is by the
25 8th. I think we can dispense with the need for an acknowledgement of service in this case. I
26 think we will draw up the order in this case. We include a provision that the need to
27 acknowledge service is dispensed with.

28 On the basis that it is the 8th, then, Mr. Wignall, what date would you suggest for evidence
29 in reply? The 8th is a Friday.

30 MR. WIGNALL: I would think only a few days, two or three days.

31 THE PRESIDENT: You are basically replying to the evidence not to the claim form, and you
32 have got the evidence.

33 MR. WIGNALL: Yes.

34 THE PRESIDENT: It would be what - it is 4 pm on each date.

1 MR. WIGNALL: The 12th, Sir.

2 THE PRESIDENT: You would have the weekend as well. So the 12th, and evidence in reply on
3 the 14th, which is a Thursday. Then it could probably be heard in the middle of the
4 following week.

5 MR. JONES: Sir, could I have permission to look at my diary on my phone?

6 THE PRESIDENT: Yes, we should all look at diaries.

7 MR. WIGNALL: Would you forgive me if I went outside to make a call, because my telephone
8 diary is----

9 THE PRESIDENT: Why do I not rise for a couple of minutes. I think we can hear it on the 21st
10 or 22nd, but I may need to check that as well. It will give you time to do skeletons, and so
11 on. I would have thought a one day hearing would be sufficient. I will just rise for ten
12 minutes and we will get a date as well. I think the 20th, 21st and 22nd are okay.

13 (Short break)

14 THE PRESIDENT: Yes.

15 MR. JONES: Sir, I think I speak for both of us if I say any of those dates would be fine.

16 MR. WIGNALL: We have a preference for the 21st or 22nd, if that is possible.

17 THE PRESIDENT: Let us go for 21st July. Then skeleton arguments by, I will say, noon on
18 19th July, and hearing bundle. Then one day, 21st July for one day.

19 MR. JONES: The hearing bundle also by noon on the 19th?

20 THE PRESIDENT: By noon on 19th, with skeletons.

21 MR. JONES: Sir, I am grateful for that. There are two more short points, if I may just quickly
22 raise them. One is that my client is waiting for a phone call to hear whether he can resume
23 the courses. Sir, I intend to say that the orders on a conventional approach take effect as of
24 now, and the undertaking therefore takes effect as of now rather than waiting for the written
25 document from the Tribunal. In other words, the courses can resume as of now, at the end
26 of this hearing?

27 THE PRESIDENT: Yes.

28 MR. JONES: Sir, the second point is a point which is not relevant to today, except that I have
29 been asked to raise it. It is a costs point really. It is only because my learned friend's
30 skeleton argument is, of course, in the public domain. I just want to make a very quick
31 response to what is quite a trenchant criticism made in that skeleton, which is, in short, the
32 criticism that my client and solicitors did not put them on notice and acted precipitously in
33 bringing this.

1 THE PRESIDENT: I have seen the correspondence, where they said they are minded to seek
2 judicial review and they asked for a suspension, and the response was that that would not be
3 granted.

4 MR. JONES: That is right, Sir. That was the only point I wanted to make, Sir, and I am grateful.

5 THE PRESIDENT: The costs are reserved, and that will be dealt with in due course.

6 Is there anything else, Mr. Wignall?

7 MR. WIGNALL: Would you give me one moment, please?

8 THE PRESIDENT: Yes.

9 MR. WIGNALL: In relation to my learned friend's submissions, I understand that for the courses
10 to resume material has to be uploaded on to the Sentinel system, so it would not be possible
11 to begin the courses until tomorrow morning.

12 THE PRESIDENT: The suspension for the postponement of the period takes immediate effect.
13 What has to be done to implement that in practical terms might involve doing some things
14 on your website, and that might take until tomorrow. That is what you are saying. Your
15 client, Mr. Jones, can plan to resume courses tomorrow. Presumably there will not be any
16 courses this afternoon anyway.

17 MR. JONES: Whether it is this afternoon or tomorrow morning, I am not sure of the mechanics,
18 but the broad outline, Sir, is as you have expressed it. I am grateful.

19 THE PRESIDENT: Very well. I will see you all on the 21st. We will draw up the order and
20 provide it to you later today.

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