IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURT
OF ENGLAND AND WALES
[2018] EWHC 3835 (Ch)

No. BL-2017-000665

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 23 November 2018

Before:

MR JUSTICE FANCOURT

B E T W E E N :

PJSC COMMERCIAL BANK PRIVATBANK — Claimant

- and -

(1) IGOR VALERYEVICH KOLOMOISKY
(2) GENNADIY BORISOVICH BOGOLYUBOV
(3) TEAMTREND LIMITED
(4) TRADE POINT AGRO LIMITED
(5) COLLYER LIMITED
(6) ROSSYN INVESTING CORP
(7) MILBERT VENTURES INC.
(8) ZAO UKRTRANSITSERVICE LIMITED — Defendants

J U D G M E N T

A P P E A R A N C E S

MR S. SMITH QC and MR T. AKKOUH (instructed by Hogan Lovells International LLP) appeared on behalf of the Claimant.

MR M. HOWARD QC (instructed by Fieldfisher LLP) appeared on behalf of the First Defendant.

MR D.JOWELL QC and MR R.ESCHWEGE and MR M. PARKER (instructed by Skadden, Arps, Slate, Meagher & Flom LLP) appeared on behalf of the Second Defendant.

MS S. TOLANEY QC and MR T. PLEWMAN QC (instructed by Pinsent Masons LLP) appeared on behalf of the Third to Eighth Defendants.

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MR JUSTICE FANCOURT:

1 On this application for permission to appeal, I remind myself that the relevant test is whether there is a realistic possibility of an appeal succeeding as opposed to an appeal being fanciful. It is not part of my job to assess the strength of the case beyond that.

2 So far as the Article 6 point is concerned, I am satisfied that there is a question of law on an arguable point. I would put it myself this way, although the ultimate formulation of the argument, of course, is a matter for the appellant: whether the "sole object" test that is established in the European jurisprudence is properly applicable and how it should be applied where there is a good arguable claim against an anchor defendant for either hundreds of millions of dollars or over a billion dollars, whichever it is, even though that defendant appears to have no assets that would ordinarily justify very expensive litigation being brought against it. It seems to me, notwithstanding the Cartel Damages decision and Sabbagh v Khoury, that there is sufficient scope for argument on that point.

3 On the reflexive application of the Lugano Convention, similarly, it seems to me that there is an important question of law here. The authorities do not speak with a single voice, although I have come to a clear view on which of them I should follow. There is no Court of Appeal decision, despite the Recast Regulation coming into force in 2015 with its new provisions in Article 33 and 34. There is still relevance in the Lugano context, and possibly other contexts, and it is arguable, in my judgment, that there should not be a stay in such circumstances, absent the kind of express provision there now is in the Recast Regulation. It also seems to me to be an arguable point that the dismissal of the proceedings in Ukraine, subject to appeal, is not for these purposes to be treated as related proceedings, even though I have obviously decided the point differently.

4 Similarly, in relation to the English Defendants, the same point is arguable on the question of whether there are relevant related proceedings in Ukraine, given the dismissal of the defamation claim, subject to appeal. I also accept, on the basis that I intend to give permission to appeal on those jurisdictional and stay issues, that the claim against the BVI defendants should be permitted to go to appeal on the back of the possible success of the appeals on the jurisdiction and stay issues.

5 However, on the arguments about quantum and non-disclosure and inadequacy of the reasoning of the judgment, I refuse permission to appeal. The argument on quantum really amounts to no more than that in my assessment I should have given more weight to evidence that was given on behalf of the Bank and less weight to evidence that was given on behalf of the defendants. The assessment of the weight of that evidence was a matter for me, and the likelihood of the Court of Appeal interfering with my assessment is not, in my judgment, realistic.

6 So far as the unjust enrichment claim is concerned, I do not consider that an appeal on that basis is reasonably arguable insofar as it is relied upon to lead to a higher quantum of a potential claim than the quantum of the tortious claim.

7 On non-disclosure and misrepresentation, in my judgment, there is no reasonably arguable case that I erred in my assessment that there was material non-disclosure and that it was not accidental. The assessment of evidence on a question like that is a matter for the judge at first instance and the Court of Appeal only rarely interferes with the judge's assessment. It is

not suggested that I approached my assessment on the basis of a mistaken understanding of the relevant law.

8 So far as the ground of lack of reasons for my decision is concerned, I do not consider it to be reasonably arguable that my judgment fails to give reasons so that it is apparent to the parties, the public and the Court of Appeal why one party has won and the other party has lost. I consider that to be transparently clear from my judgment. The fact that a judgment, which is long enough, does not deal with every piece of evidence or every argument advanced in a case of this size and complexity, does not mean that there is a failure of the type relied upon.

9 So, in due course, when I hand down the final judgment, I will grant permission to appeal on the jurisdiction and stay issues. I will refuse permission to appeal on quantum, non-disclosure and lack of reasons.

LATER

10 As I have refused permission to appeal on the issue of the arguable quantum of the Bank's claim and on setting aside the freezing order for deliberate non-disclosure, it is not appropriate for me to grant either a stay of the discharge of the injunction or grant a continuation of the injunction until the hearing of the appeal on other grounds, for which I have given permission. However, the Bank may apply for permission to appeal on the grounds for which I have refused permission. It is possible that the Court of Appeal may disagree with my refusal to grant permission. If it does, then an appeal on those grounds may ultimately succeed.

11 In those circumstances, I have to consider whether or not it is appropriate to grant a limited stay of the discharge of the injunction pending that application, if the Bank makes it, for permission to appeal and, if an application is made, until the application for permission to appeal is finally disposed of. Of course, if the Court of Appeal decides to grant permission to appeal, it can consider at that stage whether or not to continue the stay or grant further injunctive relief as the case may be.

12 In making my decision, I remind myself that the normal rule is that there is no stay pending an appeal. The burden is on the party seeking a stay to show why it could be irremediably prejudiced unless a stay is granted. In the absence of such prejudice, there is unlikely to be a good reason for a stay. When I make my decision I must bear in mind the detriment likely to be caused to the Bank if no stay is granted but its appeal later succeeds, and balance that against the detriment likely to be caused to the defendants if the injunction effectively continues pending the disposal of that application. If that application is refused the effect will be that the injunction will have remained in place for a further three months perhaps, maybe a little longer.

13 There seem to me to be two other particular considerations in this case. First, I have held that there is no jurisdiction against the first and second defendants and, in principle, that is obviously a highly material consideration, but I have given permission to appeal on that issue and so recognise a realistic possibility that the Court of Appeal may disagree with the conclusion that I reached. Had I refused permission to appeal on that issue, it might have been a different matter.

14 The second particular issue I should bear in mind is that the Bank obtained its injunction on a without notice basis and failed to make full and frank disclosure. Had it made full and

frank disclosure it might not have obtained the injunction that is now in place. But it is equally possible that had it made full and frank disclosure it would have obtained injunctive relief, given that the defendants have been forced to accept, for the purposes of these hearings, that there is a good arguable case, albeit in a much lower amount than the amount of the Bank's claim, and also to accept that there is objectively a sufficient risk of dissipation. So it seems to me that, despite the failings of the Bank in presenting its without notice application, it would not be right to say that it only obtained injunctive relief by reason of a breach of duty. Nevertheless, the injunction that it did obtain was wrongly obtained.

15 This is a case where it is accepted, for the purposes of these applications, that the Bank has an arguable case for a very substantial amount of money and there is a risk of dissipation of assets. In those circumstances, it is easy to see what serious prejudice could be caused to the Bank if the injunction were to come to an end but it then succeeded in establishing that my decision to discharge the injunction was wrong and that it should have continued. On the other hand, the injunction is a serious matter, clearly, for all the defendants. It has been in place now for almost a year and I am told appears to work reasonably well, or at least the machinery works reasonably well in that there are wide exclusions for legal expenditure and expenditure in the ordinary course of business, and where the order requires the Bank to give its consent to particular expenditure the Bank has done so in all cases. It has not been necessary for the defendants to come back to court to seek adjudication on such matters.

16 There is no evidence before me today of any particular or additional prejudice that would be caused to any of the defendants by extending the injunction for a further period of three months or so, until the Court of Appeal determine the application for permission to appeal. I do, however, accept that inevitably the presence of such an injunction will have some degree of inconvenience and some consequence in terms of expense for the defendants, but they are protected in principle by the undertaking in damages.

17 Balancing the rival risks of prejudice and the extent of the prejudice, bearing in mind the circumstances in which the injunction was obtained in the first place, I consider on balance, but only just, that the balance of convenience does favour retaining the injunction in the short term pending that application for permission to appeal on the grounds on which I have refused it and, if such an application is made in time, until the determination of that application. A further stay thereafter will be a matter for the Court of Appeal depending on the outcome of the application.

LATER

18 I now have to deal with the costs in relation to the applications that I heard in July this year and in the case of those defendants where I found there was no jurisdiction to sue them their costs of the claim that has been brought against them. Although the issues on the applications and in the claims are complex and the amount of costs that have been expended by the parties is very high indeed, I can make this judgment fairly short. The issues of principle that arise are fairly straightforward to deal with in a case like this.

19 It is accepted by the claimant that the defendants are the successful parties and that it is the unsuccessful party. One question I have to consider is whether or not there is a reason to depart from the general rule, which is that the unsuccessful party will pay the costs of the successful party. As ever, that is likely to depend on an assessment of the extent to which a party had partial, if not complete success, and on the conduct of the parties.

20 First, it is appropriate to note that the defendants succeeded on these applications on all the main issues that were contested. Those defendants that were challenging the jurisdiction of the court succeeded in challenging the jurisdiction; those seeking a stay of the proceedings succeeded in obtaining a stay. The defendants have succeeded in establishing that the amount of the bank's claim has been significantly overstated, although the precise amount of that overstatement remains to be resolved by me in the light of further submissions I will receive next week. The defendants have succeeded on their applications to set aside the worldwide freezing order for misrepresentation and non-disclosure. This is not one of those cases in which one party has succeeded on most of the issues, thereby winning most of the claim, but on other issues the other party has succeeded.

21 The question, therefore, I have to consider is whether or not there are particular issues here where the claimant can properly say that it succeeded on the issues and the defendants lost them, despite the fact that the defendants succeeded on all the substantial issues that I heard and gave judgment on. If they get over that hurdle, the next question is whether or not that should result in their having any of their costs relating to those issues or whether a proportion of the defendants' should be disallowed.

22 The order for costs that the claimant invites me to make is that the claimant should have their costs on a standard basis of what they call all the abandoned issues. I will come back to what those are in a moment. Secondly, that the defendants should have their costs on all the issues except for the abandoned issues, but only on the standard basis.

23 The abandoned issues, as they are described, concern a number of distinct points which at one stage looked as though they were going to be argued, such as whether or not there was an arguable case at all against the defendants, whether or not there was a risk of the defendants dissipating assets and other issues or arguments relating to discrete points that were capable of having a bearing on the outcome of the substantial issues but were not themselves substantial issues to be determined. Examples of these were whether or not it was appropriate for the claimant to have obtained a "without notice" injunction without giving notice to the defendants, and whether or not the claim that the claimant brought was in breach of a Ukrainian injunction. There were also a number of separate issues raised at various stages relating to whether Cypriot law applied in relation to the unjust enrichment claim that the claimant brought and whether or not there were distinct points of Ukrainian law in relation to certain aspects of the claim that the claimant brought that were challenged by some or all of the defendants. There was also an allegation of non-disclosure by the claimant of the fact that defamation proceedings had been started in Ukraine. There was an issue about the extent to which President Poroshenko in Ukraine had knowledge of or had become involved in the proceedings.

24 Apart from all those issues that fell away and were not ultimately argued before me, there was one distinct area where a matter was argued in relation to whether or not related proceedings existed in the Ukraine, a category of proceedings called the "new borrower" proceedings. This was argued and the defendants did not succeed in persuading me that those were related proceedings, under the Lugano and Brussels treaties, but nevertheless they did succeed on those points in relation to the defamation proceedings.

25 These issues, therefore, were a number of points that, for the most part, were not argued in front of me and, for one reason or another, were not pursued by the defendants. On the one point that I have mentioned that was pursued, the defendants did not succeed on the particular point, but they nevertheless succeeded in establishing that there should be a stay of the proceedings on the basis of other related proceedings in Ukraine.

26 The defendants accept in principle that it is fair to treat these points as points or arguments on which they failed, but nevertheless they say that failure on those points or arguments should not have the result that any of the costs to which they are in principle entitled should not be paid to them and certainly they should not have to pay any of the claimant's costs. They say they should not be punished for abandoning issues before trial beyond the consequences that would have followed if they had fought them at the hearing and lost on those points, but nevertheless succeeded on all the main issues in the claim.

27 It seems to me that in this case on every overarching issue in the applications the defendants have been successful. In those circumstances, is it appropriate for me to depart from the general rule on account of the particular issues and arguments that I have identified, which were either not pursued by the defendants or on which they did not succeed?

28 This is a case that I have found to be brought on an improper basis by the claimant to establish jurisdiction against the first and second defendants in an inappropriate way and to obtain emergency injunctive freezing orders from the court on the basis of misleading and inadequately disclosed evidence. In a case like that there should only be a departure from the general rule if it is possible to say in respect of a particular issue or argument, that it gave rise to a substantial amount of discrete expenditure on the part of the defendants and it is a point that should not properly have been raised or pursued by them.

29 I am not satisfied that that is an appropriate description of any of the points that I have described that were raised and not pursued or were pursued and not succeeded on. Although undoubtedly there will have been some costs that are attributable to addressing and dealing with those points, there is no specific evidence on behalf of the claimant that readily identifiable and very substantial amounts of money were spent on those issues. Neither do I find that any of those issues, when they were raised on behalf of the defendants, were improperly raised or improperly pursued.

30 In those circumstances, in my judgment there is no proper basis in this type of case, as I have described it, for saying that the defendants should be disentitled to any part of their costs on the basis that various issues or arguments - sub-issues and arguments for the most part - were raised, caused some degree of money to be spent on them but were then not pursued or were abandoned. In my judgment, this is an appropriate case to recognise the overwhelming extent of the defendants' success on the applications by making an order that they are, in principle, entitled to be paid all their costs of the applications and therefore in the case of the defendants who were not established to be subject to the jurisdiction of this court, all the costs of the claims brought against them.

31 The second issue that I have to determine is whether or not the costs should be assessed on the standard basis or on the indemnity basis. In my judgment, it is appropriate, in view of the way in which the jurisdiction against the first and second defendants was established in this case, or sought to be established, by bringing a claim against the third to fifth defendants for the sole purpose of establishing that jurisdiction, which is an abuse of Article 6 of the Lugano Convention, and the material non-disclosure on the *ex parte* application for the freezing order and the degree of exaggeration of the claim, that the costs should be assessed on an indemnity basis. As Mr Smith rightly says, that has the consequence that the approach to the detailed assessment is different. The onus of proof then lies on the paying party to establish that the costs were unreasonable and the criterion of disproportionality of costs falls away.

32 Mr Smith tried to resist what I regard as the inevitable conclusion that costs should be paid on an indemnity basis by relying on what he says were my findings in my judgment of an underlying fraud on an apparently epic scale. Those were, of course, not final findings, but observations as to what the evidence that the claimant had been able to adduce appeared to show. Whether or not there was such a fraud involving any of the defendants will be a matter for trial somewhere someday.

33 In any event, the fact that the claim that was brought arises out of a fraud, even if that is established, is not, in itself, a reason for saying that where the claim has been brought on an inappropriate basis and that highly invasive injunctive relief has been obtained as a result of material non-disclosure, costs consequential on that should not be paid by the claimant on an indemnity basis. In my judgment, the indemnity basis is appropriate for the costs in this case.

34 I turn, then, to the final question, which is what, by way of interim payment, should be paid by the claimant to each of the defendants in this case. What I have to try to do is form a realistic assessment of the sum which, on any view, it is likely that the relevant defendant will recover in due course on a detailed assessment on the indemnity basis.

35 In the case of the first defendant, that is a very difficult exercise to perform for two reasons. First, the costs are very, very substantial indeed. The total costs sought to be recovered are about £9 million. There is inevitably no costs schedule equivalent to the kind of schedule that is produced on a summary assessment after a one-day hearing, which gives a very detailed breakdown of £9 million worth of costs. Nevertheless, the short schedule that has been produced provides very little detail at all. It contains, for example, single items for work done on documents for 7,107 hours and 58 minutes, amounting to £2,008,000 of costs, and in another part of the schedule another 4,506 hours of work done on documents for £1.55 million worth of costs. With that kind of schedule and the very substantial amounts of money to which it relates, it is extremely difficult for a judge in my position to have a feel for the sort of figure by way of costs, even on an assessment on an indemnity basis, that the first defendant is likely to recover. I therefore have to be conservative in my approach, particularly in the case of the first defendant. The position is slightly different in relation to the other defendants because of the difference in the nature of the schedules that they have produced.

36 Doing the best I can, I determine that the interim payment in relation to the first defendant's claimed costs should be only an amount of about 40 per cent of the total bill of costs that has been placed before me. I cannot be sufficiently confident a bill of that magnitude, even on an assessment on an indemnity basis, is going to give rise to a liability of more than £4 million. It may well do so, but I simply cannot be confident of that at this stage in view of the nature of the schedule that has been produced. The interim payment will be £4 million.

37 So far as the second defendant's costs are concerned, these are lower, though still substantial. The total amount of costs claimed is £2.91 million. A rather more detailed schedule has been produced, setting out much more akin to a costs schedule produced for a summary assessment, the hourly rates charged by the fee earners in firms of solicitors and very detailed numbers of hours' work done by each of those fee earners for a specified period of time during the course of this litigation. There are four different specified periods of time and different breakdowns of costs in relation to each of those has been prepared, and different counsel's fees have been identified and different disbursements have been identified for each such period of time. I can therefore be more confident about the reliability of the figure of £2.91 million that the second defendant relies upon, but

nevertheless a degree of caution is appropriate, given the very substantial amount of money and given also the very considerable overlap between the interests of the first defendant and the second defendant, so far as this litigation is concerned.

38 In the case of the second defendant, I therefore make an order for payment of £2 million by way of an interim payment.

39 So far as the third to eighth defendants are concerned, they were represented together by one firm of solicitors and a team of counsel. They have prepared a summary schedule of costs which is more like the second defendant's schedule and less like the first defendant's schedule in that there is considerable breakdown of the various different hours that have been spent by different fee earners and their hourly rates and the amounts of fees that have been billed to the different defendants. The total amount of costs on their schedule is £2.1 million. I would adopt a similar approach and similar proportion in their case to what I adopted in the case of the second defendant and therefore I will determine that an interim payment of £1.5 million should be paid in the case of the third to eighth defendants.

40 The final point raised by Mr Smith on behalf of the claimant is that, given the identity of the defendants and the fact that apart from the third to fifth defendants they are not resident or domiciled in this country, the costs should not be paid to them but should be paid instead into a solicitor's holding account to await the outcome of the claimant's application for permission to appeal. In my judgment, there is no real justification for making such an order, or at least there has been no specific basis put forward in evidence before me which would justify making such an order. At this stage it is clear that very substantial amounts of money have been spent by the defendants on legal fees. It seems to me appropriate on the basis of my findings that they should have those interim payments on account of costs at this stage and not that those monies should be held in a solicitor's client account to await further developments.

41 The orders for costs that I have made in favour of the defendants are only ever going to be reversed, such that a repayment is appropriate, in the event that the claimant succeeds in its appeal, not just on jurisdictional and stay issues, but also in relation to re-establishing the freezing injunction I have held in principle should be discharged subject to a short-term stay. If that were the case, then the proceedings would be continuing in this court, but as things stand at present, I do not consider it appropriate to hold those monies back. I determine that they should be paid within a reasonable period of time, as to which I will hear what the claimant says about what is a reasonable period of time for payment of those sums.

CERTIFICATE

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(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge