

Case No: CR-2019-004187 and CR-2019-008077

Neutral Citation Number: [2021] EWHC 1831 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
London
EC4A 1NL

Date: 8 July 2021

Before:

DEPUTY ICC JUDGE RAQUEL AGNELLO QC

Between:

KRISHNA HOLDCO LIMITED

Petitioner/Claimant

and

(1) GOWRIE HOLDINGS LIMITED

(2) SAMIT GOVINDJI HATHI

(3) GOVINDJI THAKERSHI HATHI

(4) ALPA HATHI

(5) PORTSIDE NORTH LIMITED

(6) LAXMICO GROUP FINANCE LIMITED

(7) SYRI LIMITED

(8) LAXMI BNS HOLDINGS LIMITED

Respondents/Defendants

Mr Iain Quirk QC and Ms Freddie Onslow (instructed by McCarthy Denning) for the
Petitioner and for related parties in the other linked proceedings
Mr Fraser Campbell (instructed by Burges Salmon LLP) for the First to Seventh Respondents
and related parties in the other proceedings
Mr Christopher Harrison (instructed by JKW Law) for the Eighth Respondent

Hearing dates: 25, 26 February 2021 and 12 March 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:00hrs on 8 July 2021. I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DEPUTY ICC JUDGE AGNELLO QC:

1. On 25 and 26 February 2021, I heard the CCMC in relation to the four sets of proceedings, being numbers CR-2019-004187, CR-2019-008077, CR-2020-002329 and CR-2020-002340. These proceedings are linked and due to be heard together at trial. For the purposes of this judgment, reference to KHL is to be taken as meaning KHL and those parties that are represented by the same solicitors. Reference to the Gowrie Parties is to be taken as being reference to all the parties in the three sets of proceedings represented by the same solicitors. The Eighth Respondent in the unfair prejudice petition, being the company itself, will be referred to as LBNS. At the hearings on 25 and 26 February 2021, I heard various applications as well as fixing the costs budgets. I heard an application for security for costs and an application for an interim payment in relation to the order for costs made relating to the amendments to the pleadings made by KHL. There was also an application by KHL seeking an order for costs in relation to the costs which had been reserved from an earlier hearing relating to requests for further particulars. The CCMC was then adjourned for a further half day before me on 12 March 2021. Despite the adjourned hearing time, there remained outstanding matters and therefore I directed that written submissions be filed on a sequential basis at the end of March 2021 for me to determine the outstanding issues relating to summary assessment of costs, relevant costs orders in relation to the

reserved costs and an issue relating to the costs of the interim payment application.

2. I do not propose to set out in this judgment details of the proceedings themselves or repeat the issues which I dealt with in ex tempore judgments at the hearings. To the extent necessary, this judgment must be read as part of the judgments already delivered on certain issues as I shall not repeat them here. This is particularly relevant in relation to the assessment of costs relating to the application for security for costs. In considering the summary assessment of the costs in relation to the security for costs application, I have taken into consideration the matters raised before me as well as the issues which were raised and needed determination before me.

3. The issues which this judgment will deal with are as follows:

(1) summary assessment of the costs relating to the security for costs application. I made an order for security for costs and also made an order that KHL do pay the Respondents' costs of and occasioned by the security for costs application on the standard basis.

(2) KHL's application for an order for costs in its favour in relation to an earlier application relating to requests for further information ('the RFIs'). The costs of the application had been reserved to the CCMC heard before me. This relates to the Gowrie parties only.

(3) Costs of the application for an interim payment in relation to the amendment costs.

Costs of the security for costs application – order dated 12 March 2021

4. The application for security for costs was opposed on various grounds by KHL. These grounds included the argument that, by reason of the way that the Gowrie parties had pleaded on the issue of escrow/dividends, this effectively meant that the Gowrie parties were secured and therefore this needed to be taken into account, at least in part, in relation to any application for security. I found against KHL on these arguments, but I accept that they occupied a considerable period of time both before me and also in preparation.

5. The Gowrie Parties seek a total sum of £101,834 which includes VAT. Excluding VAT the sum claimed is £98,883.34. For the purposes of this judgment, unless reference is otherwise made, I will deal with the sums claimed as being excluding VAT. The figure includes a sum of £10,000 which the Gowrie Parties explain relates to the costs incurred after the granting of security and relates to the negotiation of the form of letter of credit requested by KHL. The security which KHL had to provide in relation to the Gowrie Parties was in the region of £5 million. KHL's costs schedule is considerably lower, being a total of £49,390. Whilst it is, in my judgment, helpful to know the amount claimed by way of costs by the losing party, this is not in itself determinative of whether the sums claimed are excessive or disproportionate to what the application actually entailed. I also bear in mind that it was the application issued by the Gowrie Parties (and LBNS dealt with below).

6. KHL submits that it had indicated some considerable time before the application was heard that it was content in principle to provide security. I accept that this was stated some time before the application was heard, but there is, in my judgment, a difference between accepting that security should be given in principle and thereafter making it clear that it would contest not only the quantum, but also raise an argument

relating to dividends/escrow. This meant that the application before me was not simply a quick hearing relating to quantum. I note from the correspondence that KHL sought quite a lot of detail relating to the costs of the action. This is not a criticism, merely a matter which I have also taken into account in relation to the summary assessment of the costs.

7. When the matter came before me, I had by then carried out the costs budgeting exercise and for this reason the quantum was in many respects less of an issue, at least in relation to future costs. However, KHL sought to challenge the costs incurred which did not form part of the costs budgeting. All of this meant, in my judgment, that whilst KHL had stated that it was not contesting an order for security 'in principle', the reality was that the application required extensive preparation, lengthy correspondence and considerable time before me. I should add, as a general observation, the correspondence in this case has, in many instances, resembled a 'trial by correspondence' rather than being written communications which are necessary in order to progress the case and move it towards a hearing date. So although I accept there was lengthy correspondence in this case, that comment should not be taken as an encouragement in future communications. Having considered the points raised by KHL and the argument relating to escrow/dividend, I do not consider this is simply an issue of law. In order to be able to consider the law, it was in my judgment clearly necessary to consider the factual background and place the pleadings in context. To the extent, there was more work to be carried out by the Gowrie Parties as well as LBNS.

8. KHL also make the point that the Gowrie Parties claim what it considers is excessive time spent on the schedules of costs. KHL considers there is a duplication of

costs relating to the schedules in support of the quantum because of the work which was carried out for costs budgeting. The Gowrie Parties explain that the specific costs breakdowns were not duplicative of the formal costs budgets work because, they submit, the exercises took place at different times and based, they submit, on different assumptions. In my judgment, there is an element of duplication, although for the reasons submitted by the Gowrie Parties, not as much as KHL assert. I will reflect this in a percentage reduction of the costs claimed.

9. KHL also submit that there was in relation to the Gowrie parties, an excessive and effectively wasteful use of fee earners. KHL point to the time spent on documents by the fee earners reaching more than 300 hours. KHL points to what it considers is not recoverable costs of £17,477 relating to the preparation of the costs budget. I have already indicated above that I accept to an extent this criticism about a certain amount of duplication and I have taken this into account in the percentage reduction on the costs. Complaint is made relating to the factual research carried out by the Gowrie Parties relating to KHL's financial position. The Gowrie Parties point out that this related to what KHL asserted was the value of the shareholdings. Again, I can see some justification for reducing what is claimed herein and again I will reflect this in a percentage reduction overall. Complaint is made in relation to time spent on certain correspondence. Again, I will reflect this in a percentage discount overall. The Gowrie Parties assert that they are prepared to reduce the costs schedule by £3,000 which relates to time spent in relation to three applications. So the percentage discount will relate to the sum claimed less the £3,000.

10. Having taken the points made into account and considered that a reduction is appropriate to enable the costs sought to be reasonable and proportionate, I have also

borne in mind the following matters. I accept that this was a substantial application to make. I also take into account that it was for the Gowrie Parties to make the application and to deal with the issue relating to escrow/dividend issues. I take into account that the complaints raised relate to work done on documents rather than Counsel's fees, or other hearing costs. I also take into account that a certain amount of work needed to be done on the costs schedule but there is in my judgment force in the point that there is a certain amount of duplication. After a deduction of the £3000, there should be a reduction overall of 25%. This provides a sum of £71,912.51 excluding VAT. This seems in my judgment more in line with what I would expect bearing in mind the application, what was involved, the time it took and taking into account the points made by KHL. For the avoidance of doubt, I should add that a reduction which KHL invite me to do down to £45,000 seems to me unrealistic bearing in mind what was involved, the time spent and also the fact that the application, the evidence and the preparation overall had to be carried out by the Gowrie Parties. In the event that my sums are incorrect, the costs of the Gowrie Parties are summarily assessed by me on the basis of the sum of £98,883.35, less the £3,000 and thereafter a deduction on a percentage basis of 25%. This is on the figures excluding VAT.

11. In relation to LBNS, the sum claimed in relation to its application for security totalled £30,752.50 excluding VAT. KHL submits these costs are too high on the basis that KHL had, it submits in principle, agreed to security. However, as I have set out above, the application before me was considerably more than simply an issue as to quantum or legal arguments. These arguments also related to LBNS because KHL submitted that LBNS could have taken steps to declare a dividend. I found against KHL on this point as well. It seems to me that the points raised by KHL had to be dealt with

by LBNS. Issues relating to company law as well as the surrounding facts were presented and considered by me.

12. In my judgment, it is not helpful to seek to divide up KHL's costs as between the Gowrie Parties and LBNS. I consider despite the submissions made that the costs of LBNS are overall reasonable. Their role was measured and, in my judgment, proportionate. I was not faced with submissions by the Gowrie Parties and LBNS which duplicated one another to a large extent. As is set out in the written submission, costs in the region of £30,000 in relation to the award of security exceeding £1 million is not disproportionate. I agree, although I should add this point is not the only factor I have taken into consideration when summarily assessing costs. I have, in relation to the Gowrie Parties, reduced by way of a percentage, the costs. In relation to an element of duplication, I am prepared to reduce the LBNS costs by a more modest amount. I will summarily assess the costs of LBNS in the sum of £28,500.

(2) KHL's Application for the reserved costs relating to the RFI application

13. The background to this application relates to an application for further information made by KHL as against the Gowrie Parties. The court did not deal with whether the RFIs were justified and would have been ordered by the court because the parties reached agreement. The Gowrie Parties assert that, as is set out in their correspondence at the time, they agreed to provide the particulars on the basis that this would save time before the court and without there needing to be a determination as to whether KHL would have obtained the same order from the Court had the application been heard. The Gowrie Parties state in their correspondence that they agreed to provide the particulars without prejudice to their position that the requests (or at least some of them) were unreasonable/excessive. In order to determine whether KHL are entitled to

their costs, I would need to hear the application itself and determine whether KHL would have obtained the order which was agreed to by the Gowrie parties. I do not accept the point made by KHL that I can effectively rely upon the concession made by Gowrie, or as more colourfully called, 'the capitulation'. Parties can frequently agree to providing RFIs or even documents under disclosure which they consider are not really necessary but it is in fact a costs saving to agree to provide them rather than have a contested hearing. I also accept that in certain cases a party may seek to reserve its position in circumstances where the Court then determines that it would have made an order against that party on the evidence.

14. I note that KHL rely on the 'capitulation' in their written submission rather than seeking to present arguments as to why the RFIs should have been ordered. In all the circumstances, it seems to me that the most appropriate place and time to determine this issue as to costs is at the trial itself. Without effectively hearing the RFI application, it does not seem possible to consider both sides to the argument properly. It may well be that KHL are correct and that a court may well have ordered the RFIs on a contested hearing. Equally it may well be that the Gowrie Parties are correct and that the RFIs, or at least some of them may not have been ordered and that its approach to provide them was not a concession, but instead a practical and commercial position. In reaching this conclusion, I also bear in mind that the costs sought in relation to the RFI application, whilst not insubstantial, are not, in relation to the overall value of the claim brought by the KHL parties, really significant. Having carried out the costs budgeting exercise and ordered some significant amounts to be provided by way of security for costs, it does not seem to me that KHL suffer in having this matter dealt with at the trial itself. I accept that the parties agreed, and therefore the court ordered, that the costs be reserved to the CCMC. However for the reasons I have set out above, it does not seem to be a

satisfactory way of dealing with the matter by relying, as KHL seek to invite me to do, on what they call a concession meriting an order for costs. The trial judge will be in the best position to deal with this issue. I therefore adjourn the issue of the costs reserved relating to the RFI application to be dealt with at trial.

(3) interim payment on account

15. Having determined that it is not appropriate to determine the reserved costs of the RFI application, this leaves the issue of the costs of seeking an interim payment in relation to the amendment costs. I should start by indicating that in my judgment, orders for interim payments on account are the general rule. Such an issue should not occupy much court time. This particular issue has occupied more court time due to issues relating to the quantum but also in relation to the KHL position seeking effectively to relate the sums to be paid on account to the application for the reserved RFI application costs. As the latter issue has now been adjourned by me to trial, then in my judgment, there is no need to consider this issue further save to consider the order on the costs of the interim payment application. I accept the Gowrie Parties' submission that the Gowrie Parties were successful in their application. I do not accept that the costs should be reduced by some percentage to reflect the fact that the Gowrie Parties sought initially an interim payment of £95,000 but before me this was reduced to a request for £70,000, in order to seek to narrow the dispute before me.

16. KHL had argued for no payment to be ordered, or alternatively seeking to reduce the sums sought by the Gowrie parties. To the extent that I directed a substantial interim payment on account, then the Gowrie Parties have succeeded. I do not consider that it is appropriate to seek to reduce the costs by a percentage because the Gowrie Parties initially sought £95,000, then before me reduced this to £70,000 and I directed a sum

of £65,000. KHL opposition was not simply on the issue of quantum as I have already stated. I should add that the issue raised as to the ADR/mediation is not one which necessarily takes the issue, in my judgment, much further. Parties are encouraged to seek to mediate and in some cases, this may also relate to costs issues. However, on the facts and in the circumstances of this case, I am not prepared to deviate from the usual rule of costs following the event because KHL wanted to mediate costs issues. The RFI reserved costs as well as the costs arising from the interim payment on account costs, are issues which arose before me in the CCMC. The main issues in the CCMC have been dealt with by me and those issues enable the proceedings to proceed to trial. Whilst costs issues are in many cases important for the parties, it seems in this case, more time is being spent arguing costs issues than seeking to move the case forward to trial. Bearing in mind the value of the case for KHL, this does seem somewhat to be a loss of focus. I understand that no party is keen to be liable for costs in a case where it believes the other party is also due to be liable for costs. However, this is in my judgment simply one of the consequences of commercial litigation. This is particularly the case when one considers the quantum of the costs which are involved on this particular issue, being some £23,000.

17. I approach the summary assessment on costs on the basis of whether the sums sought are reasonable and proportionate to the application they relate to. I have also taken into account the points made by KHL. The sum being sought by the Gowrie Parties is the sum of £23,314, inclusive of VAT. I note that KHL assert that the solicitors costs are too high. Having considered the schedule, there appears to be something in that point bearing in mind the application. I will summarily assess the costs in the sum of £20,000 inclusive of VAT.