**[2021] EWHC 2129 (Ch)**

Case No: BL-2020-001416

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**

**BUSINESS LIST (Ch D)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

6 July 2021

**Before** :

**Mrs Justice Bacon**

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**Between :**

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| **WWRT Limited** | **Claimant** |
| **- and -** | |
| **Sergiy Tyshchenko and Olena Tyshchenko** | **Defendant** |

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**Andrew Ayres QC and Thomas Munby** (instructed by **Rosling King LLP**) for the **Claimant**

Hearing date: **6th July 2021**

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# APPROVED JUDGMENT

**Mrs Justice Bacon:**

**RECUSAL APPLICATION**

1. The first application before me today is an application by the first defendant, Mr Tyshchenko, that I recuse myself from the hearing of the other applications listed for this hearing. Mr Tyshchenko made submissions on this as a litigant in person in Ukrainian, with the assistance of Mrs Tyshchenko, who translated his submissions into English.

2. The basis of this application is a claim that a fair-minded observer would believe that I was biased, based on my conduct at and judgments given in the initial hearing of the freezing injunction on 4 September 2020 and the return date on 10–12 March 2021, leading to a judgment dated 21 April 2021.

3. The relevant test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge or tribunal was biased: *Axnoller v Brake* [2021] EWHC 949 (Ch), §51.

4. The starting point is that the mere fact that a judge has, earlier in the same case, decided a matter adversely to a particular litigant does not mean that the judge is biased: see *Zuma's Choice Pet Products v Azumi* [2017] EWCA Civ 2133, §29. The judge should only recuse themselves in that situation where there is substantial evidence of actual or apparent bias: *Otkritie International Investment v Urumov* [2014] EWCA Civ 1315, §13.

5. The types of case in which recusal might be appropriate include:

   (a) cases where there is an appearance of bias arising from a judicial error, such as the use of intemperate or unjudicial language: *JSC BTA Bank v Ablyazov* [2013] 1 WLR 1845, §69;

   (b) cases where the judge has expressed a final concluded view on the same issue as arises in the application: *Zuma's Choice Pet Products*, §30;

   (c) cases involving the credibility of an individual, in circumstances where the judge has in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on the judge's ability to approach that person's evidence with an open mind on any later question: *Locabail v Bayfield* [2000] QB 451, §25;

   (d) cases where the judge has, in previous hearings in the proceedings, expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on the judge's ability to try the issue with an objective judicial mind: *Locabail v Bayfield*, §25; and

   (e) any other case where there are real grounds for thinking that the judge is likely to reach their decision by reference to extraneous matters or predilections or preferences: *Otkritie*, §22.

6. It is, however, clear that the mere fact that a judge has commented adversely on a party or witness, or has found the evidence of a party or witness to be unreliable, will not, without more, give rise to a sustainable objection of bias: *Locabail*, §25.

7. In the present case, there are no sustainable grounds for the objection of apparent bias raised by Mr Tyshchenko. Almost all of the grounds advanced in Mr Tyshchenko's application notice and accompanying witness statement are objections to the substantive findings that I made in my April

judgment. It was also apparent from Mr Tyshchenko's submissions to me this morning that his main objection was the substance of the findings in that judgment.

8. The defendants' case was, however, put fully at the March hearing, at which Mr Tyshchenko was represented by solicitors and both leading and junior counsel. While the defendants' case was largely rejected for the reasons given in my judgment, as Mr Ayres QC pointed out there were also several issues on which I found against the claimant. If either of the defendants took issue with the findings in my judgment the proper forum in which to raise that would have been an appeal. No application for permission to appeal, however, was made by either of the defendants. That being the case, it is not open to Mr Tyshchenko now to seek to dispute the conclusions in my judgment by way of a recusal application.

9. Mr Tyshchenko undoubtedly disagrees, in very strong terms, with my findings. But he has not identified any point on which my views were expressed in such extreme, unbalanced, or otherwise unjudicial terms as to cast doubt on my ability to continue to hear applications in these proceedings with an objective mind.

10. It is also notable that many of the points now raised by Mr Tyshchenko are matters that were not raised by his counsel at the March hearing, but were raised by the second defendant Mrs Tyshchenko. Mr Tyshchenko may, of course, now consider that they are good points that his legal representatives should have taken at the hearing, but that is not a reason to suggest that my findings on those matters were biased.

11. Mr Tyshchenko also contends that I put Mrs Tyshchenko into financial hardship by not releasing her property, Tanglewood, from the freezing injunction. Again, however, if Mrs Tyshchenko took issue with any of the orders made, that could have been the subject of an application for permission to appeal. But no application was made, and the fact that Mr Tyshchenko may now disagree with the orders made against Mrs Tyshchenko is not a sound basis for an allegation of bias.

12. Finally, there are some complaints about my conduct at the initial freezing injunction hearing in September 2020. It is said that I mocked Mr Tyshchenko's name, but it is clear from the transcript of that hearing that I did not do so. The comment in question, on page 6 of the transcript, was a request that we should call the defendants together "the Tyshchenkos" rather than referring to them by their first names as it was apparent to me that there might be difficulties in correctly pronouncing Mr Tyshchenko's first name, given that no one speaking in court was a native speaker of Ukrainian.

13. The other complaint regarding that hearing is made about a comment of Mr Todd, on page 60 of the transcript, where he said: "I love my mother also, but that's a rather generous gift to your mother." It is said that I "supported" that comment. In fact, it is apparent from that page of the transcript that the comment was made in the middle of a set of submissions by Mr Todd and I made no response whatsoever to it.

14. There is therefore no basis for my recusal in these proceedings, and I reject Mr Tyshchenko's application.

## STAY APPLICATION

### Introduction

15. The second application before me today is an application by Mr Tyshchenko for a stay of the present proceedings on the grounds that there are pending proceedings in Ukraine which seek, among other things, to invalidate the assignment agreements that are the foundation of the claimant's claim in these proceedings (as I described in the first paragraph of my judgment of 21 April 2021).

16. Mr Tyshchenko says that if the court proceeds with the present proceedings there is a risk of a judgment that might conflict with the judgments of the Ukrainian courts in those other proceedings. His application for a stay was issued on 5 May 2021 and first came before Falk J in the interim applications court. The judge directed that the application should be relisted with an appropriate time estimate, and gave directions for evidence to be served on both sides, including expert evidence.

17. I now have before me three witness statements from Mr Tyshchenko dated 5 May, 17 June and 6 July 2021; two witness statements from Ms Gutovska for the claimant dated 14 June and 5 July 2021; an expert report from Mr Evgen Pugachov for Mr Tyshchenko; a responsive expert report from Dr Vadim Tsiura for the claimant; a reply report from Mr Pugachov, for which no permission has been given; and a response to that from Dr Tsiura, for which likewise no permission has been given.

### Background

18. The background to these proceedings is set out in the judgment of 21 April 2021 and I do not repeat it here. The factual basis of the present application is two sets of proceedings brought in Ukraine to contest the assignment of rights from JSC Fortuna Bank to the Ukrainian company Star Investment One (**Star**) (**the first assignment**), and then from Star to the present claimant, WWRT (**the second assignment**), as follows:

    (a) The claim to invalidate the first assignment was issued in the Kiev Commercial Court on 20 October 2020. It was brought against Star by Factor Energogroup; WWRT has now been added to those proceedings as a third party. Mr Tyshchenko is not a party to those proceedings.

    (b) The claim to invalidate the second assignment was issued in the Kiev Commercial Court on 9 December 2020. It was brought against Star and WWRT by Factor Energogroup; Mr Tyshchenko is listed as a third party.

19. In Mr Tyshchenko's submissions this morning he also referred to further new claims brought in Ukraine during the course of June 2021 which are referred to in a sixth witness statement from him of today's date, sent to the court very shortly before the hearing commenced. He submitted that these further claims should also be taken into account in support of his application for a stay of these proceedings. Those claims are:

    (a) A claim within Mr Tyshchenko's Ukrainian bankruptcy proceedings to invalidate the second assignment agreement, with the claimant being Mr Tyshchenko and the defendants listed as Star and WWRT.

    (b) Another claim within Mr Tyshchenko's Ukrainian bankruptcy proceedings, for damages against Rosling King, Star and WWRT.

(c) Claims by both Mr and Mrs Tyshchenko against Star relating to the disclosure of banking information to WWRT, and also seeking to establish that rights have not been assigned to Star.

**Legal basis of stay application**

20. For the purposes of today's hearing, Mr Tyshchenko provided a one-page skeleton argument which itself does not explain the legal basis on which his stay application is made. Helpfully, however, Mr Ayres set out in his skeleton argument what he understands to be the two arguments advanced by Mr Tyshchenko on the basis of Mr Tyshchenko's skeleton argument for the hearing before Falk J. The first basis for a stay is said to be Article 34 of the Brussels Regulation (Recast) (**BRR**) on the basis that the invalidation proceedings are related proceedings pending in a third state. The second possible basis for a stay is the exercise of the court's general case management powers.

**Abuse of process**

21. Before addressing either of these two bases for a stay, I need to address first the claimant's submission that, insofar as the stay application relates to the two sets of invalidation proceedings brought by Factor Energogroup last year, it should in any event be dismissed as being a clear abuse of process either on the basis that it is a *Henderson v Henderson* abuse or is a collateral attack on my April judgment.

22. In *Henderson v Henderson*, 3 Hare 100, Sir James Wigram, VC said at pages 114–115:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

23. The principle was subsequently set out authoritatively by Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1, 30–31:

> "The underlying public interest is ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. …
>
> It is however wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of all of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

24. Mr Ayres has also drawn my attention to the recent judgment of Mr Justice Popplewell in *Koza v Koza* [2020] EWCA Civ 1018, §42, in which he made clear that the *Henderson* principle will apply

to interlocutory hearings as much as to final hearings, such that if a point is open to a party on an interlocutory application and is not pursued, then it cannot be taken at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change in circumstances, or new facts of which the applicant was not aware and could not reasonably have discovered at the time of the first hearing.

25. In the present case, the original two sets of Ukrainian proceedings -- that is the two invalidation proceedings brought by Factor Energogroup -- were commenced well before the March return date of the freezing injunction application, and they were not only referred to at the hearing but were also referred to in §27(v) of my April judgment. Those proceedings could therefore have been relied upon by Mr Tyshchenko to make precisely the same arguments that are now raised in his stay application, but he did not do so.

26. Mr Tyshchenko now says in his witness statement that his lawyers advised him not to raise the point that is now put forward, in order not to undermine his jurisdiction application. That advice given is of course a matter for him and his former legal representatives. But whatever the position in that regard, Mr Tyshchenko's evidence shows clearly that he considered the possibility of relying on the Ukrainian invalidation proceedings prior to the March hearing and for whatever reason chose not to raise that point.

27. There is, however, in my judgment, no doubt whatsoever that if a point was going to be raised in this regard, it should have been taken at the March hearing. The central issue raised by Mr Tyshchenko in that hearing was his challenge to jurisdiction on the grounds that the present proceedings should be stayed in favour of the Ukrainian insolvency proceedings commenced on 9 December 2019. Insofar as Mr Tyshchenko also wished to argue that the proceedings should be stayed in favour of a further set of Ukrainian proceedings commenced in 2020, that is an argument that clearly should have been raised at the same time.

28. Mr Tyshchenko suggested this morning that the court should have raised this point of its own initiative. I unhesitatingly reject that submission. If the Ukrainian invalidation proceedings were said to be a basis for staying the present proceedings on some basis, that was a submission that needed to be articulated and explained at the March hearing. That is particularly the case given that it appears that at least one of the legal bases now relied upon by Mr Tyshchenko in support of a stay, namely Article 34 of the BRR, was also one of the legal bases relied upon by Mr Tyshchenko's counsel in support of a stay in favour of the Ukrainian insolvency proceedings. But even insofar as Mr Tyshchenko is now relying, in the alternative, on a request for a stay on case management grounds, the principles of a case management stay were also explicitly discussed in the skeleton argument filed on his behalf for the March hearing.

29. In these circumstances, it is quite clearly abusive for Mr Tyshchenko to decide (according to him, on the advice of his lawyers) not to pursue a stay argument based on the Ukrainian invalidation proceedings at the March hearing, but to raise it now by way of a further application after his arguments at the March hearing had failed. The claimant's submission that the application should be dismissed as an abuse of process is therefore, in my judgment, well-founded insofar as it relates to the Ukrainian proceedings brought in 2020.

**Merits of the stay application**

30. I will now consider in any event the merits of the application as it relates to all of the Ukrainian proceedings now relied upon by Mr Tyshchenko, particularly given that Mr Ayres accepts that the

abuse of process argument does not arise in relation to the more recent Ukrainian proceedings filed in June 2021.

31. First, it is clear that insofar as the application is put on the basis of Article 34 BRR it is doomed to failure, for the simple reason that Article 34 is engaged only where the action in the courts of the third country is pending at the time when the proceedings commenced in the domestic court. In the present case, however, this court was first seised. The without notice hearing was on 4 September 2020 and the claimant's claim was filed on the same day, with the particulars of claim following on 1 October 2020. The Ukrainian proceedings initially relied upon by Mr Tyshchenko were not commenced until 20 October and 9 December 2020 respectively, and the more recent proceedings were not commenced until June 2021. Article 34 BRR is therefore inapplicable.

32. The alternative suggested basis for the stay is the exercise of the court's general case management powers. The principles on which a case management stay might be granted were set out in *Mad Atelier International v Manes* [2020] QB 971, §82, and summarised at §60 of my April judgment.

33. The present case does not come close to being one of the "rare and compelling circumstances" in which it would be appropriate to grant a case management stay on the basis of those principles. Even leaving aside the fact that this court was the first seised, such that a case management stay would effectively circumvent the conditions under Article 34 BRR, Mr Tyshchenko's skeleton argument and witness statements make clear that the point of substance on which a stay is sought is the risk of conflicting judgments. But the court in *Mad Atelier* found that the risk of inconsistent judgments will not justify a stay where the court has jurisdiction under the BRR, which is the case here.

34. In addition, it is clear from §82(4) of *Mad Atelier* that a stay will not in general be appropriate if the other proceedings will not bind the parties to the action stayed, or finally resolve all the issues in the case to be stayed, or the parties are not the same.

35. As to that, in relation to the first invalidation claim, Mr Tyshchenko is not even a party, so the parties are not the same. More importantly, in relation to all of the Ukrainian proceedings relied upon now, the Ukrainian judgments could not as a matter of English law create any issue estoppel or *res judicata* or be enforced by the English courts, since the Ukrainian courts are not courts of competent jurisdiction under English law on the basis of Rule 43 of *Dicey*. That is because the claimant is not present in the Ukraine, nor is it the claimant or counterclaimant in the Ukrainian proceedings, nor has it submitted to the jurisdiction of the court or agreed to do so.

36. Mr Tyshchenko has also said himself in his witness statement dated 17 June 2021 that the aim of the 2020 Ukrainian claims was "not to disrupt the English proceeding, but rather to discontinue it and have a claim struck out as WWRT Limited has no legal standing and has no and could not have any rights of claim against the defendants". He confirmed at the hearing that the more recent June 2021 claims have essentially the same aims as the 2020 claims, albeit that the more recent claims have additional objectives such as obtaining damages and are brought by him in a personal capacity,

37. I have considerable sympathy with Mr Ayres' submission that to allow a stay in these circumstances would be to allow Mr Tyshchenko to manufacture a situation where the English court, which properly has jurisdiction over the claim, is prevented from determining the substance of the dispute. On any view, the timing and purpose of the Ukrainian claims does not provide a compelling reason to grant a stay on case management grounds.

38. The claimant has referred to other grounds on which it says the stay application is wholly unmeritorious, including submissions as to the merits of the two invalidation claims in the Kiev Commercial Court and also points regarding the timing of the Ukrainian proceedings. I do not need to address those points in light of the conclusions that I have already reached. Likewise, I do not need to consider the expert evidence of Mr Pugachov and Dr Tsiura on matters of Ukrainian law.

**Conclusion**

39. Even if I had not found the stay application to be an abuse of process in relation to the 2020 invalidation applications, I would have dismissed it on the merits in relation to those proceedings; and I also dismiss it on the merits in relation to the Ukrainian proceedings commenced in June 2021.

**COSTS MANAGEMENT**

40. I have considered Mr Ayres' submissions opposing any costs management, in which he rejected the suggestion that there is a substantial imbalance between the parties and submitted that, while the claimant's costs are large, the claimant has had to deal with what is put in front of them, including applications which the claimant says are made without merit.

41. I have however formed the view that, without making an order of some kind, there is a real risk that costs will be disproportionately incurred. In particular I consider that the costs incurred by the claimant at previous stages were extremely high. I am therefore minded to make some kind of costs management order, and I consider that the appropriate order to make is that the claimant should file their cost budget in the usual form 21 days before the first CMC in these proceedings.

42. I have considered Mr Tyshchenko's concern that costs management should take place as soon as reasonably practicable, and I am aware of his concern that costs to date have escalated. I think that the first CMC is the first date on which it is reasonably practicable for there to be a further costs management order, having regard to the claimant's costs budget. The only steps that are outstanding between now and the CMC are the filing of Mr Tyshchenko's defence (which will have to be done in any event before the claimant can put forward a cost budget), the provision of documentary disclosure by Mr and Mrs Tyshchenko, and then cross-examination on their assets which is due to take place in September. The first case management conference will, I hope, take place shortly after that and I think that that is the right point at which some form of costs management order can be made.

43. I will therefore order that the claimant's cost budget should be filed 21 days before the first CMC in these proceedings and that the judge at that CMC will be able to review the costs budget and make any appropriate revisions to that, as well as any other appropriate order that seems warranted in the circumstances.

**COSTS**

44. Mr Tyshchenko has brought a stay application which has failed. Mr Ayres is asking for his costs of that application in the usual way. A costs schedule has been prepared and filed in compliance with the rules on summary assessment of costs. I think it is appropriate for me to make a costs order and to assess summarily. The hearing has lasted less than a day, it is an appropriate case for the summary assessment of costs and it was an application which Mr Tyshchenko brought and lost. Although Mr Ayres has not asked me to say that the application was totally without merit, I have given my reasons for rejecting the application and I rejected it on several bases. I think that it is therefore appropriate to make it a costs order in the claimant's favour.

45. Mr Ayres asks for costs in the sum of £215,000. He makes the point that those costs involve two sets of witness statements and two sets of expert reports, as well as the cost of a hearing before Falk J in the interim applications court which resulted in the relisting of this application with directions. He says that the costs of that application before Falk J were essentially wasted and the application should not have been brought in that manner but should have been listed as an application by order, although he accepts that Mr Tyshchenko would not be familiar with that term.

46. I agree that the application should not have been brought in the interim applications list, but should have been brought separately. On any basis, it was a substantial application and has occupied considerable time today. Indeed the initial four-hour time estimate was approximately correct. It is also the case that the witness evidence filed by the claimant was responsive to that of the defendant and, likewise, the expert evidence was responsive.

47. Having said all of that, I consider that the costs claimed are excessive for a stay application that has lasted less than a day. I therefore summarily assess the costs at £150,000, which will be payable within 14 days.