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No.CL-2017-000174

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY

COURTS OF ENGLAND AND WALES

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Rolls Building

Friday, 2nd March 2018

Before:

MR JUSTICE BRYAN

IN THE MATTER OF THE ARBITRATION ACT 1996
AND
IN AN ARBITRATION CLAIM

B E T W E E N :

GPF GP S.à.r.l. — Claimant

- and -

THE REPUBLIC OF POLAND — Respondent

MR R. DIWAN QC (instructed by Dentons UK and Middle East LLP) appeared on behalf of the Claimant.

MR S. SHACKLETON (instructed by Gateley Plc) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE BRYAN :

1 I have handed down my judgment this morning in an arbitral jurisdiction challenge under s.67 [2018] EWHC 409 (Comm). That challenge has been successful in this sense, which is that I have found that the jurisdiction of the tribunal is enlarged (if I can put it like that), i.e. that the tribunal's jurisdiction is wider than was found by the arbitrators, such that all the issues which are sought to be advanced in that arbitration by the claimant, GPF GP S.à.r.l., can be argued before the arbitrators, so in that sense it has widened the scope of the arbitral jurisdiction.

2 There is an application before me this morning for permission to appeal from my judgment. The underlying scope of the dispute in relation to jurisdiction concerns the proper construction of a bilateral investment treaty. It seems to me that the treaty is obviously, by its nature, on its own particular wording. The decision I have made turns on the wording of that individual treaty and on what are the ordinary and natural meanings of the words used, applying Article 31 of the Vienna Convention. I am satisfied that the ordinary and natural meaning of the words is as set out in my judgment and that there is no real prospect of the contrary being found in the context of any appeal.

3 However, turning to the submissions that are made before me today by Mr Shackleton, who has helpfully set out in some considerable detail what are essentially his draft grounds of appeal albeit that they feature throughout the post-judgment submissions. They are essentially as follows, and I will deal with each of them in turn. The first relates to whether or not the hearing before me, under s.67, was a re-hearing or not. I am afraid that ground of appeal is, in my view, hopeless. It is well established at first instance, in the Court of Appeal and in the Supreme Court, and for the reasons identified in my judgment, that the nature of the hearing under s.67 is a re-hearing and that the time has long since passed where that could be seriously called into question. A recent example is *C v D*, a decision of Carr J, and in that decision she - absolutely rightly, in my view - reached the conclusion that a hearing under s.67 is a re-hearing, as I have in this case. I should also add that even if I had not been satisfied that that was the case, there has been full consideration of the authorities in a number of those cases, and therefore I would, in the ordinary course, have followed that line of authority anyway. But I am satisfied that it is the correct approach, for reasons that I have set out in my judgment. So there is no real prospect of success in relation to that ground and no basis for me to give permission.

4 The second point relates to linguistic issues. I address the linguistic point at some length in my judgment. This point ultimately goes nowhere because I found that those differences made no difference to the issues of construction that were before me on the ordinary and natural meaning of the words used. I did make clear, and I reiterate, that the meaning I ascribed was based on the French test and those translations into English which are reflective of the meaning in French and not any meaning in English which is not reflective of any French language text. So there is nothing in the linguistic issue ground.

5 The next ground is the proper interpretation of Article 9.1(b) of the BIT. As I foreshadowed at the start of this application, this turns on the ordinary and natural meaning of the words used in the particular bilateral treaty. That is a classic one-off point, and I am satisfied, for the reasons given in my judgment, that the meaning given to those words by me in my judgment reflects the ordinary and natural meaning of the words used in this particular bilateral treaty, and that there is no real prospect of a contrary view being taken by the Court of Appeal, were I to give permission.

6 In that context, I also bear in mind the fact that the construction of those words in my judgment is an interpretation which also gives meaning and effect to what has been called the first and second clause of Article 9.1(b), whereas the construction which was put upon it by the tribunal and sought by the respondent, in my view, did not give meaning and effect to the ordinary and natural meaning of the clause, nor indeed did it give meaning and effect to both parts and all words used in that clause.

7 That leads on to the next ground of appeal, which is alleged to be a misuse of the principle of effectiveness, which I effectively just touched upon. I disagree with the proposition that the principle of effectiveness was misused. My use of that principle was a classic example of the principle of effectiveness and its application. On the respondent's and the tribunal's interpretation, there was no real meaning or effect given to the second clause. I am satisfied that there is no real prospect of there having been an error of law in that area.

8 The next aspect was whether or not I had erred in relation to my judgment on the *pro tem* test. In relation to this, I am satisfied that there was no arguable error of law in relation to its application, based on the findings I made in my judgment, and there is no real prospect of success in relation to that.

9 The next ground of challenge is whether or not I correctly applied the principles in relation to creeping expropriation. Those principles are well established, and I have set those principles out at length. I do not consider that there is any real prospect of a different view being reached by the Court of Appeal.

10 Those then were the grounds of appeal taken individually. However, it seems to me right that I should stand back and look at the overall position to see whether the accumulation of all the separate grounds of appeal means that there is either a real prospect of success or some other reason why I should grant permission to the Court of Appeal. I say that because I am conscious of the fact that under s.67 of the Act only I, as a Commercial Court Judge, can give permission, that there is no appeal here from, and no possibility of the Court of Appeal themselves giving permission. It is a matter for the judge hearing the application under s.67. I have therefore given careful consideration whether, notwithstanding the fact that none of the individual grounds themselves stand any real prospect of success, taking them all together or having regard to the wider picture of the grounds taken as a whole, I should grant permission to appeal to the Court of Appeal.

11 I am, however, satisfied that there is no real prospect of success on all the grounds taken as a whole, and no other reason that would render it appropriate for me to grant permission to the Court of Appeal. I also take into account the fact that there should be finality in arbitration and that arbitration matters should proceed as expeditiously as possible, as the Commercial Court recognises and has recognised in a number of previous judgments. That would not stop me, if I felt that there was a real prospect of success, granting permission to appeal, because that would be the right course to do, but I am satisfied that there are no real prospects and no other reason to grant permission to the Court of Appeal, and that will also ensure the speedy and expeditious progress of the arbitration, which is consistent with the Arbitration Act 1996 and the principles underlying that. For all those reasons, I therefore dismiss the application for permission to appeal.

L A T E R (COSTS)

12 The underlying matter that was before me was an application under s.67 of the Arbitration Act to determine the jurisdiction of the tribunal. I have today delivered my judgment in relation to this and found that in fact the jurisdiction of the tribunal was wider than that which was said by the arbitrators, and I have therefore set aside the relevant part of the award and substituted my findings in relation to jurisdiction. It follows that the claimant, GPF GP S.à.r.l, are the successful party in relation to this matter, and it is not in dispute, at least not challenged, that costs should follow the event, so that the Republic of Poland should pay the costs of and occasioned by this action to the claimant.

13 The issue that arises, though, is in relation to the quantum of those costs. I have before me the appropriate costs schedule from both parties. I should say the underlying hearing was a hearing for nearly two days on a substantial matter involving a bilateral investment treaty. The first question in fact is whether or not it is appropriate for me to summarily assess those costs or whether I should refer the matter, if the matter cannot be agreed, for detailed assessment. There is no doubt this was a substantial matter. To give a flavour of that, the costs claimed on behalf of the claimant amount to some £331,129.75. The costs of the respondent are considerably more modest. It is entirely a matter in my discretion as to what to do. There is some guidance in the Commercial Court Guide at section F14.2: almost invariably where the costs involved are less than £100,000, this court will summarily assess them.

14 It seems to me - and ultimately this was common ground between the parties - that this is an appropriate case where the costs can be summarily assessed, even though the amount is greater than that. There are a number of advantages to that. One of them is that it saves time and costs of the parties and produces earlier certainty for them. It also saves court time and resources as well. It is also the practice of this court, as I have heard today from anecdotal evidence consistent with my own experience, that this court is willing, where it considers it appropriate, to assess costs summarily where larger costs claims have been made, and I do consider, having heard this matter over nearly two days, that this is a case in which I am in a position to assess these costs summarily. Indeed, ultimately, I was urged to do so by Mr Shackleton on behalf the Republic of Poland.

15 That being the case, I have therefore considered both the costs claimed and the submissions that have been made before me this morning. The overall question is whether or not costs are reasonably incurred. Inevitably, being a summary assessment of costs, it is something of a rough and ready exercise. There are, however, a number of points which have been made which I have borne well in mind. There is one which is described as a point of principle, but that simply means it is a factor that does not specifically apply to individual items, and that relates to whether or not there were new issues run before me which were not run before the arbitrators, whether or not that has led to increased costs, and whether or not I should reflect the fact that those arguments were only raised for the first time before me in costs. In particular, it is said before me that the legislative history of the bilateral treaty is something which was raised before me; it was not raised in the manner that it is now raised before the tribunal. I have to say that I suspect that any costs involved in that were relatively small, given that there was only a small slip of correspondence in relation to this, and it did not involve a great deal of time during the course of the oral hearing. But I bear in mind the point that is made in that regard.

16 So far as the other points that were made, as to the differences between how things were run before the tribunal and before me, I do not consider that any of those points would fall into the category that Gross J was considering in the *Electrosteel Casings* case, whereby those changes should be reflected in costs. As often happens, and as is actually expressly

recognised in at least one of the other s.67 cases, in my experience as a judge of this court, and indeed in practice before that, when matters come before this court on a s.67 application, where experienced counsel and advocates such as I have before me today are instructed, the arguments often develop as they have indeed developed before me. It is also right to say that the number of authorities that were before me were very considerably greater than were before the tribunal, and again that is a reflection of the fact that this is a re-hearing. So I bear in mind the point, but I do not consider it to be a major factor in terms of my assessment of costs.

17 Leaving aside that point, the main points made were as follows. Firstly, it is said the overall costs figure is disproportionately high considering the nature of the application and what are said to be the limited issues involved. I will bear in mind the submission about whether or not the overall costs are disproportionately high in making my assessment, but I do not agree that the issues involved in this s.67 application were in any way, shape or form limited. Simply to give a flavour, there were some nine volumes of authorities, involving lengthy international awards in various forums. I am satisfied that that material was necessary and was required to assist the very helpful submissions that I have received both from Mr Shackleton and from Mr Ricky Diwan QC before me. That inevitably involved quite a considerable amount of expense.

18 Whilst ultimately the main issue, which was the proper construction of Article 9.1(b), could be said to be a short point of construction, that characterisation is belied by the number of underlying issues which were raised both by the claimant and the defendant and, as can be seen from my judgment, had to be dealt with. So this was a complex s.67 application, as was reflected by the fact that both parties applied for (and were granted) permission to exceed the normal guideline page limits for matters in relation to such an application. That itself is a reflection of the detail of this case and the number of issues that arose, and the complexities of this case. The fact that ultimately I considered that the ordinary and natural meaning was clear and that there was nothing in the point, is beside the point. It was only possible to reach that conclusion having heard detailed submissions from both parties and having considered two rounds of evidence which were both necessary. This obviously inevitably increased the costs on both sides.

19 There was then a point made about comparative costs, and it is fair to say that the costs of the claimant at £331,000-odd are very considerably more than those of the respondent, which amount to some £66,676. There was a suggestion made by Mr Diwan, on behalf of the claimant, that there may have been some form of fee capping, but I am satisfied, having heard from Mr Shackleton, that that is not the case. However, what is clear, as Mr Shackleton himself told me, is that, as you would expect when being instructed by a government organisation, there would no doubt be budgets in relation to each stage of the litigation, which could be increased, and were increased, and no doubt there was therefore considerable care as to how much time was spent in relation to each area. I think a factor to bear in mind, quite apart from the fact that the application was brought by the claimant bears the greater burden of preparation, is that the Republic of Poland is very fortunate in having the services of Mr Shackleton, who is very experienced in public international law matters, and it may well be that they have actually achieved a cost saving which would not be available to the ordinary litigant. By that, I, in no way shape or form cast any aspirations upon both the firms involved for the claimant or indeed their counsel.

20 But it does seem to me that there are a number of particular factors which explain why the statement of costs of the Republic of Poland is lower than it might otherwise have been. Just to give one example of that, preparation in relation to this hearing (which includes

taking up judgment post-hearing matters) two hours has been charged in relation to very impressive submissions which I received overnight which themselves would take probably the best part of at least an hour even to read. So I think there are distinctive reasons why there is a distinction in the costs between those of the claimant and the respondent. But I do bear in mind that there is an obvious difference between those costs, and that is best explored, in my view, by consideration of how the costs claimed are broken down.

21 Breaking things down, there is a claim for Dentons London fees of £84,000-odd; Dentons Paris of £81,000, and Dentons Warsaw of £16,000-odd. The backdrop is, as explained by Mr Diwan, that Dentons Paris were involved in the underlying arbitration, and therefore Dentons Paris had the specialist expertise in that regard. That also involved work by Dentons Warsaw, and it was necessary for the involvement of both Dentons Paris and Dentons Warsaw, given the issues that arose in relation to how the arbitration had been conducted and the findings of the arbitrators that were made. I consider that it was entirely reasonable and appropriate for there to be involvement of both Dentons Paris and Dentons Warsaw, and for the client to turn to the specialist experience of Dentons London in relation to an application under s.67 of the Arbitration Act. I do, however, bear in mind that the consequence of that is that some of the amounts involved for solicitor time in that regard are very significant, and I bear in mind the possibility that there may need to be some relatively small adjustment (but certainly some adjustment) for any duplication and for the need to involve quite so many senior lawyers from three different Dentons entities.

22 It does seem to me, however, that this is an important matter. The amounts involved in the arbitration are significant. The claim is for a minimum of €16.6 million, plus three years' interest from December 2014. So this is, on any view, a substantial matter, and there is no doubt that the issues were complex, as reflected in the length of the skeleton arguments, the bundles of authorities before me and indeed the length of my own judgment. It does seem to me, against that background, that it was both necessary and appropriate that there would be involvement at a partner level as well as at a more junior level, and that is reflected in the costs that are being claimed. But, as I say, I do bear in mind the points made on behalf of the Republic of Poland in terms of the number of individuals involved, their seniority and the respective involvement of each particular firm. There are some more, if I can put it like this, minor points, and I say that because Mr Shackleton himself used the words "minor points" about the time involved for translation and the use of lawyers and lawyers' fees, but we are only talking about a relatively small amount of money in that regard. Again, I bear the point in mind, but it does not have a significant impact on the overall assessment.

23 There is also a point about whether or not the evidence filed went beyond what was needed, and that echoed something I said in para.16 of my judgment. The irony about it is, that it is only on the basis that I found in favour of the claimant that it went beyond what was needed, because the argument advanced on behalf of the Republic of Poland necessitated an examination of the detail of what was and was not argued before the tribunal and also what was or was not pleaded or set out in the statement of case. Indeed, that very point is pursued and persevered in today by Mr Shackleton before me. But it does seem to me, therefore, that in the event, even though I considered it was not necessary to have all that material, I had to have all that material in order to reach that conclusion, and therefore I do not think there can be any real criticism for the fact that I had that volume of material before me.

24 It is also pointed out by Mr Diwan, on behalf of the claimant, that in fact in their initial witness statement they endeavoured to keep the supporting evidence relatively limited, but that in fact in the responsive evidence they were criticised for not having put in certain material, including the Warsaw Court of Appeal judgment and certain other material, before

this court and, perhaps inevitably, by the time matters came before me, there was a very substantial amount of material before me that was before the tribunal. That no doubt in itself led to a considerable amount of costs being incurred.

25 The final element, as it were, in relation to which Mr Shackleton draws my attention and suggests that there should be some adjustment relates to what is said to be excessive use of counsel time, that the full amounts of the fees of the QC concerned were a five-figure sum, and that involved a sum of some £59,000-odd for advice in conference and documents, excluding the brief fee and refreshers for the hearing, which obviously was also substantial. It seems to me, on a summary assessment, it is inappropriate for me to express a detailed view about the precise amount of fees of commercial counsel. What I have to consider is whether or not those fees were reasonably incurred. It seems to me this was a very complex matter. It involved special expertise, not only in the Arbitration Act 1996 and applications under s.67, which in themselves are something of a speciality, but it also involved experience of counsel who had the relevant experience of public international law and bilateral treaties, and it does not surprise me at all, in the light of the issues which have arisen in this case, that a substantial amount of counsel time and usage was done in this case. But I do bear in mind that there are also various partners no doubt involved within the solicitor time as well. I do not consider that there was excessive use of counsel, but I do bear in mind the fact that there is a possibility that there may have been some small element of duplication between solicitor time and counsel time, because both of those individuals and entities would have their own views on essentially the same point. But ultimately it was perfectly reasonable both to instruct counsel of such seniority and involve such counsel in the exercise. So it seems to me that I reject the general submission of excessive use of counsel, but I do bear in mind the overall counsel fees involved and the overall solicitors' fees involved, and the possibility that there may have been some degree of overlap, and the possibility that some time was incurred which it was not necessary to incur, and that ultimately is a decision for the client, and perfectly understandable, but it does not necessarily follow, on the summary assessment of costs, that all that amount of the costs should be recoverable.

26 Those then were essentially the points that were taken by Mr Shackleton. I should confirm that I have carefully taken into consideration all the points that were raised by him, both in those written costs submissions and in his oral submissions before me today, and indeed as I have those of Mr Diwan.

27 Against that background then, I turn to the summary assessment, and the figure that I assess the costs at is a figure of £273,000.

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This transcript has been approved by the Judge.