Neutral Citation Number: [2021] EWHC 1471 (Comm)

Case No: CL-2021-000159

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 28/05/2021

Before :

SIR MICHAEL BURTON GBE
Sitting as a Judge of the High Court

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Between :

Private Joint Stock Company Pharmaceutical Firm "Darnitsa"	**Claimant**
- and -	
Metabay Import/Export Limited	**Defendant**

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Christopher Harrison (instructed by **Hausfeld & Co LLP**) for the **Claimant**
Joseph Sullivan (instructed by **Humphries Kerstetter LLP**) for the **Defendant**

Hearing date: 28 May 2021

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Approved Judgment

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SIR MICHAEL BURTON GBE :

1. I have refused permission to appeal, on the basis that I conclude that there is no prospect of success. I now record in writing the judgment which I gave on a number of ancillary matters at the consequentials hearing.

2. Costs, as opposed to costs reserved. The Claimant has succeeded on all issues: (i) establishment of a good arguable case, based on the cause of action in the Ukraine proceedings (ii) risk of dissipation brackets (iii) no failure to give full and frank disclosure. I refer to my judgment [2021 EWHC 1441 (Comm). Mr Sullivan submitted that the costs should be reserved. The general presumption under the CPR is that costs orders should be made where issues have been disputed and resolved. I was referred to a judgment of Martin Spencer J in **Bravo v Amerisur Resources plc** [2020] Costs LR 1329, in which he concluded that this principle applied in the case of a contested application for a freezing order, that the costs should be assessed and not reserved. He said at [53-54] that "*the purpose of a freezing injunction is to avoid a successful claimant being unable to enjoy the fruits of his success because there are no assets left against which the judgment can be enforced, but that is a different kind of holding of the ring to that which is involved in the usual interim injunction and balance of convenience type case... In the circumstances I do not consider that it is appropriate to make an order reserving the costs, as I do not consider that a judge at trial is going to be in any better position than I am to adjudicate upon the costs of these applications*". I was not persuaded by Mr Sullivan's submission that the fact that this was a s25 order should make a difference, indeed if anything it would make it more appropriate to have a final order. I was however persuaded that, not least because it appears that in **Bravo** there was no prior ex parte hearing, the proper course was to sever off the ex parte application and the costs which were specifically attributable to appearing at that ex parte hearing, while taking account that all the preparation and evidence for that ex parte hearing was used for the inter partes hearing. The order I made was that the costs limited to appearance on the ex parte should be reserved, but that the balance of the costs, including the inter partes hearing, should be assessed and paid by the unsuccessful Defendant.

3. Indemnity costs. The Claimant's solicitors made a without prejudice save as to costs offer, by letter dated 12th May, in relation to the inter partes hearing, which was fixed for 19 May. This was an entirely reasonable and sensible offer "*to seek to save costs and court time*". The offer was for the Freezing Order to continue and the Defendant's discharge application to be withdrawn, on the basis that there be no order as to the costs of the discharge application, and the costs of the freezing injunction and the continuation application be reserved. Had this been accepted, not only would both sides' costs of the hearing before me have been saved, but the Defendant would have ended up in a far better position than it is now, facing a substantial order for costs to be paid. There was no reply at all to this letter. I am clear that such sensible offers should be encouraged and that there should be some penalty for refusing them or, as in this case, ignoring them. I conclude that the conduct of the Defendants in taking that course was unreasonable, and out of the norm. I ordered indemnity costs from 14th May, i.e. giving a time for the Claimant's offer to be properly considered.

4. Naming Father and Mother in the Order. It is clear from the Ukrainian proceedings, as I set out in my judgment, that there is an arguable case that Mother and Father are (also) beneficial owners of Metabay. This is of course in issue. In the draft order put

before me by the Claimant there was a provision in paragraphs 13 and 17(ii) (a) whereby Father and Mother were identified as agents of Metabay for the purposes of being bound by the Order. If the facts alleged in the Ukrainian proceedings are correct then it would seem that as a matter of Ukrainian law Mother and Father may well be found to be Metabay's agents. But I am anxious for it not to be concluded that I have in any way so determined. I concluded therefore that it was best not to describe them as agents, but simply to identify that Metabay must not do something by its agents etc. or by Mother and Father or in any other way, and that Metabay was affected by the order by its agents and by Mother and Father. That does not prejudice them. and only affects their conduct insofar as they might take some steps which could be construed as being on behalf of Metabay, an English company. However, insofar as the Claimant included a provision in clause 8(3), imposing a positive obligation on Metabay, which might be thought to impose such an obligation upon Mother and Father, I deleted reference to them from that clause.