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9 June 2023

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST
Neutral Citation Number: [2023] EWHC 1421 (Comm)

Before

MR JUSTICE PICKEN

BETWEEN:

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(1) PALLADIAN PARTNERS LP
(2) HBK MASTER FUND LP
(3) HIRSH GROUP LLC
(4) VIRTUAL EMERALD INTERNATIONAL LIMITED

Claimants

-v-

(1) THE REPUBLIC OF ARGENTINA
(2) THE BANK OF NEW YORK MELLON (as Trustee)

Defendants

Ms Susan Prevezer KC, Mr Alex Barden and Mr James Shaerf (Instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP**) appeared on behalf of the Claimants
Mr Ben Valentin KC, Ms Tamara Oppenheimer KC, Mr Samuel Ritchie and Ms Francesca Ruddy (Instructed by **Sullivan & Cromwell LLP)** appeared on behalf of the Defendant
Mr Adam Zellick KC and Mr Ian Bergson (Instructed by **Reed Smith LLP)** appeared on behalf of the Defendant

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RULING

(Approved)

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(Official Shorthand Writers to the Court)

1. **MR JUSTICE PICKEN:** The next issue I have to address is an issue concerning the costs referable to what might be described as the claimants' true alternative bad faith case.

2. This is the case that, as I explained in my judgment at [2] and [3], I have decided it was inappropriate to determine.

3. I decided that it was not only inappropriate, but indeed undesirable to do so for the reasons set out in my judgment, recognising that, in the event that the Court of Appeal were to disagree with me on the construction of the Adjustment Provision, and therefore on the claimants' primary case, it might be necessary in due course for me to produce a judgment dealing with that alternative bad faith case.

4. At trial that alternative bad faith case was the subject of both evidence, factual and expert, and submissions.

5. It is a case which, until shortly before trial, was accompanied by a further issue, which, in the event, I did not have to decide. That further issue related to the binding effect provisions contained in the Securities. It was an issue which was addressed by the claimants in their written opening at paragraph 300 and following, section J, but, when the Republic came to serve its written opening, the Republic explained at paragraphs 177 and 178, section D9, that the Republic no longer pursued its case based on the binding effect provisions.

6. In the event, therefore, I did not have to determine that issue. That being the position by the time that the trial commenced, I explored with Ms Prevezer, in opening and indeed in closing and indeed still further in her reply submissions, whether it was necessary for me, in fact, to determine the alternative bad faith case.

7. I make it clear there I am referring, obviously, not to the binding effect case which was no longer in issue. My thinking was, as I explained at the time, that, since that alternative bad faith case only arose in the event that the claimants were wrong on their primary construction case, it would be unnecessary, and, as I said in the judgment, in

the event undesirable, to go on and determine the alternative bad faith case in any event.

8. The invitation made to me by Mr Valentin is that I should make no order for costs to cover that alternative bad faith case. He submits that that should be the position in relation to the alternative bad faith case throughout, and not limited to the period after the dropping by the Republic of its reliance on the binding effect provisions.

9. Ms Prevezer submits that that would be inappropriate, and indeed that I should make a costs order in respect of the alternative bad faith case covering the entirety of its life, including indeed at trial.

10. I have indicated during the course of both counsel's submissions that it seems to me appropriate to approach this matter by reference to two distinct periods: first, the period leading up to trial and the dropping of the Republic's reliance on the binding effect provisions in the immediate lead up to trial; and, secondly and separately, covering the period of the trial itself.

11. Dealing with the latter period first, I am quite clear that the appropriate order to make is no order in respect of the trial costs referable to the alternative bad faith case. I say that because it was, as it seems to me, open to the claimants to react to the dropping of the reliance on the binding effect provisions by the Republic by taking the stance that, in those circumstances, they need not get into the matters which alleged bad faith in the context of the binding effect provisions.

12. The claimants chose not to do that, but instead to maintain their alternative bad faith case in the event that they proved to be unsuccessful in relation to their primary construction case. In those circumstances, bearing in mind that I have not, of course, determined the alternative bad faith case, it seems to me that, as Mr Valentin submits, the appropriate order is to make no order in relation to the costs referable to that alternative bad faith case.

13. I should just say in relation to this that, in the event that I were to be required by the Court of Appeal to produce a judgment on the alternative bad faith case, it seems likely

that that would be in the context of the Court of Appeal reopening the order I am now making (or not making, more specifically) in relation to that alternative bad faith case, so as to allow whichever party proves to be successful on the alternative bad faith case, on this hypothetical scenario, to recover their costs.

14. I say no more about that and instead now focus on the first of the two periods I have identified, namely the period in the lead up to trial prior to the dropping of the Republic's reliance on the binding effect provisions.

15. In this respect, I have been informed by Mr Valentin that the claimants, through their solicitors, sought to advance the alternative case in the original letter of claim dated 10 May 2019 - in other words, at a point before the Republic had sought to rely on the binding effect provisions and so before the claimants took the stance that that reliance could be met by their assertions of bad faith or wilful misconduct or manifest error.

16. Mr Valentin's submission, in short, is that the alternative bad faith case was one which the claimants were intending to advance effectively from the outset, and freestandingly from their response to the Republic's reliance on the binding effect provisions, through making allegations of bad faith, wilful misconduct or manifest error.

17. Mr Valentin has also, in similar vein, taken me to the Particulars of Claim in their most recent manifestation, the Re-Re-Amended Particulars of Claim, but for current purposes a paragraph that has been unaltered from the outset, namely paragraph 5, which describes in summary form the claimants' case as maintaining at sub-paragraph (a) the primary contention which I have found the claimants to be successful in relation to, namely their preferred construction of the Adjustment Provision, and then sub-paragraph (b) in these terms:

"The Republic's contention that the claimants must show manifest error, wilful misconduct or bad faith in order to succeed in its claim is incorrect but in any event the Republic's conduct amounts to a manifest error and/or wilful misconduct and/or bad faith on its part."

Sub-paragraph (c) then goes on to state:

"In the alternative, the purported retrospective switch by the Republic in March 2014 to 2004 prices in respect of the reference year 2013 and its decision not to publish the GDP data in 1993 prices was carried out by the Republic for an improper purpose and/or was irrational, arbitrary or capricious."

18. Mr Valentin submits, in such circumstances, that the alternative bad faith case, which was maintained up to and during trial, is a case which has been there from the very beginning.

19. I should go on to point out that that case, the alternative bad faith case, was then amplified in section F of the Particulars of Claim, which referred back to section E, a section entitled "Manifest error, wilful misconduct and bad faith". Paragraphs 45 and 46 set out in considerable detail the facts and matters relied upon as demonstrating both the alternative bad faith case and, in terms within section E, the matters relied upon in support of the claimants' case on manifest error, wilful misconduct and bad faith.

20. Mr Valentin nonetheless observes, albeit this is not a point that at least was taken expressly on the pleadings, that, in truth, a number of the matters relied upon in section E of the Particulars of Claim as going to manifest error, wilful misconduct and bad faith are matters which do not strictly arise in that context, but arise and only arise in relation to the alternative bad faith case. Mr Valentin submits in summary that what mattered for the manifest error, wilful misconduct and bad faith case was what was set out, and only set out, in paragraph 45A, namely that:

"The relevant decisions aforesaid were made by the Republic wholly or principally for an improper purpose namely for political and/or financial reasons in order to avoid or reduce a payment under the securities".

21. I have considered this matter with some care, but I cannot accept that Mr Valentin is right. It seems to me that the plea as contained in paragraph 45A, albeit in very summary form, effectively embraces not only the facts and matters then set out in paragraph 46 in the context of section E, manifest error and so forth, but also the alternative bad faith case.

22. There is, in short, a clear overlap between the two issues. One issue did not survive to trial. The other issue did. But the overlap, in my assessment, is very clear.

23. In those circumstances, I am reminded by Ms Prevezer of what Jackson J (as he then was) had to say in ***Multiplex v Cleveland Bridge*** [2008] EWHC 2280 (TCC) at [72(viii)], namely that:

> "In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

24. It seems to me, in essence, that the costs referable to the alternative bad faith case in the lead up to the dropping of the Republic's reliance on the binding effect provisions fall into the category of common costs, i.e. costs incurred both in respect of the manifest error etc case and the alternative bad faith case. In those circumstances, I cannot accept that it would be appropriate or just for the costs of the pre-trial period to be costs which the claimants are deprived. Plainly the claimants must be entitled to their costs referable to the manifest error etc issue which ultimately the Republic did not pursue, and the fact that those costs were incurred also in relation to the alternative bad faith case is explained by the fact that they were genuinely common costs.

25. It follows that it would not be right to deprive the claimants of those costs, and therefore I decline Mr Valentin's invitation to make effectively no order in respect of those costs.

26. The further advantage of this, but I make it clear that this is not the reason for arriving at the decision that I done, is that the cost judge is then relieved of what otherwise might be an onerous responsibility of having to distinguish between the costs of the two cases: one case, which, as I say, the Republic abandoned, and another case which is yet to be determined.

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