Neutral Citation Number: [2020] EWCA Civ 1493

Case No: A3/2019/2603

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER BUSINESS LIST (CH D)
HIS HONOUR JUDGE EYRE QC SITTING AS A JUDGE OF THE HIGH COURT
CLAIM NO. E30MA931

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 November 2020

Before:
LORD JUSTICE FLOYD
LORD JUSTICE NEWEY
and
LORD JUSTICE PHILLIPS

- -

Between:

SEYED MOHAMAD ZAKI MOUSAVI-KHALKALI	**Claimant/ Appellant**
- and -	
(1) MAHMOUDREZA ABRISHAMCHI	**Defendants/ Respondents**
(2) PARS IRATEL JOINT STOCK COMPANY	

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Nicholas Goodfellow (instructed by **PCB Litigation LLP**) for the **Claimant/Appellant**
Thomas Grant QC and **Ciaran Keller** (instructed by **Grosvenor Law**)
for the **Defendants/Respondents**

Hearing date: 23 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 12 November 2020.

Lord Justice Phillips:

Introduction

1. On 18 September 2019 His Honour Judge Eyre QC, sitting as a judge of the High Court ("the Judge"), determined that Iran, rather than England, was the natural and appropriate forum for those of the appellant's claims in these proceedings that passed the merits threshold and would otherwise have passed through a jurisdictional gateway. The Judge further decided that there was no real risk that the appellant would not obtain substantial justice in Iran.

2. Accordingly, by an order dated 26 September 2019, the Judge set aside the grant of permission to serve the (amended) claim form on the respondents out of the jurisdiction in Iran, dismissed the claim and set aside an order freezing the first respondent's assets worldwide ("the WFO"). The appellant was ordered to pay the respondents' costs of the claim (and to pay those in relation to the WFO on the indemnity basis) and to make an interim payment of £325,000 on account of those costs.

3. The appellant now appeals against the Judge's decision and the order made. The central issue raised by the appeal is whether, in the light of travel advice issued by the Foreign and Commonwealth Office ("the FCO") on 17 May 2019[1], the Judge erred as a matter of fact in finding that there was no real risk that the appellant, a British/Iranian dual national, would not obtain substantial justice in Iran (the natural and appropriate forum), the alleged risk being that he would decide not to travel there to litigate for well-founded reasons ("the Jurisdiction Appeal").

4. The respondents resist the appeal, contending that the Judge's finding was properly open to him on the evidence (and was, in any event, correct). The respondents further assert, by way of a respondents' notice, that the Judge should in any event have made the same order based on his finding that the appellant had failed to disclose material facts when obtaining permission to serve out of the jurisdiction, including that the appellant has a wife of 12 years living in their marital home in Iran, where the appellant also lives when in that country.

5. The appellant also has permission to argue a free-standing ground of appeal against the Judge's order that he pay £325,000 on account of the respondents' costs of the proceedings ("the Costs Appeal"). He contends that the Judge thereby ordered payment of too high a percentage of the sum (£450,000) that the Judge had identified as the most that he could conceive the respondents would recover following a detailed assessment and which the Judge thought "might well be a generous figure". The respondents' answer is that such an order was within the generous ambit of the Judge's discretion as to costs.

[1] The appellant applied for permission to amend his Grounds of Appeal to rely also on travel advice issued by the FCO on 14 March 2020, some months after the judgment under appeal. The respondents opposed that application.

The Jurisdiction Appeal

The background facts

6. The following is a summary of the factual background relevant to the central issue on the appeal, as it appeared from the evidence before the Judge. As I will explain below, fresh evidence was adduced for the appeal, addressing events which occurred after the judgment, the admission of some of that evidence being opposed.

The appellant

7. The appellant was born in Iraq to Iranian nationals, growing up and going to school in Iran, where his father[2] was a high-ranking clergyman.

8. In 1982 he began studying in Manchester, England, in due course earning a BSc in Physics and Electronics, an MSc in Instrumentation and Analytical Science and culminating in 1991 in the award of a PhD. In that year the appellant became a dual British/Iranian citizen. He claims to have been resident in England ever since.

9. The appellant married a British national in 1987 and their two sons were born in the UK and brought up in Manchester. The appellant and his wife divorced in 2001, but she has continued living with their sons at the family home (moving to a new house in Manchester purchased by the appellant in 2007). The appellant's case is that his sons' home in Manchester is also his primary residence.

10. Also in 2001 the appellant became the Managing Director of Fanavaran Amvaj Co. ("Fanavaran"), an Iranian company in the business of providing professional services to the mobile phone industry in Iran. In 2007 the appellant married an Iranian national, who lives in an apartment in Tehran purchased by the appellant in 2009. The appellant accepts that he spends time in Iran, sometimes for prolonged periods, during which he lives in the apartment with his wife.

The respondents

11. The first respondent (whose sister is married to the appellant's brother) is an Iranian national living in Iran. He is the managing director and majority shareholder of the second respondent, an Iranian telecommunications company.

12. In 2004 the Telecommunications Company of Iran put out to tender a contract to expand a section of Iran's GSM network, the contract to be entered with a subsidiary, the Mobile Communications Company of Iran ("MCCI"). The project involved the acquisition of sites for mobile telephone masts, the construction of those masts, the installation of telecoms equipment and the integration of the masts into MCCI's network ("the MCCI Project").

13. The second respondent, having entered initial supply and service contracts with companies in the Nokia group ("Nokia"), tendered for the contract together with Nokia. The bid was successful and, on 10 May 2005, the second respondent entered into a contract with MCCI.

[2] Ayatollah Haj Seyyed Mohammad Mahdi Mousavi Khalkhali.

14. On 13 January 2006 the second respondent entered four joint venture agreements with Nokia, pursuant to which the contract with the MCCI Project was to be transferred to a Joint Venture company and managed by Nokia.

15. Thereafter the second respondent and Nokia were unable to agree the ownership structure of the Joint Venture company and various other terms, leading to a breakdown in their relationship. In August 2006 Nokia purported to terminate the joint venture agreements (a termination which the second respondent did not accept) and the contract with MCCI was never transferred to a joint venture company. The second respondent therefore remained contractually bound to proceed with the MCCI Project, and was forced to manage it without the involvement of Nokia. The second respondent completed the MCCI Project in 2009.

16. In 2010 Nokia commenced arbitration proceedings against the second respondent and the second respondent counterclaimed, each claiming substantial damages due to the other's alleged breaches of the joint venture agreements ("the Arbitration"). In May 2016 the Arbitration was settled on confidential terms. The Judge recorded that an award was made in the second respondent's favour.

The appellant's involvement in the MCCI Project and the Arbitration and the resulting claims

17. It is common ground that the appellant (or Fanavaran) provided support and services for the MCCI Project and then the Arbitration, the following being agreed:

    i) in mid-2006 the second respondent required additional financial facilities to progress the MCCI Project. The funds it borrowed originated from Bank Sepah, but were routed through Fanavaran;

    ii) in August 2006 the appellant was engaged as a consultant for the MCCI Project at a fee of US$20,000 per month and worked on the project until its completion in 2009. The appellant was also entitled to a bonus of US$1,000 per mast handed over to MCCI.

    iii) the appellant also assisted with the Arbitration.

18. The claims in these proceedings are for sums the appellant asserts are due from one or other of the respondents in relation to the above.

(i) The Loan Fee claim

19. First, the appellant claims that, in June 2006, the first respondent asked him to arrange for Fanavaran to lend US$2.4m to the second respondent for the purposes of continuing the MCCI Project. The appellant asserts that Fanavaran's board would not do so, but he arranged for Fanavaran to borrow from Bank Sepah and lend on to the appellant. The appellant then made a personal loan of US$2.4m to the first respondent pursuant to an oral agreement governed by Iranian law. The appellant further contends that one of the terms of the loan agreement was that the first respondent would pay a "loan fee" of 8%. The appellant claims that US$128,462 of that fee remains unpaid.

20. The first respondent accepts that a loan was made by Bank Sepah, through Fanavaran as its agent, directly to the second respondent, but denies, therefore, that he borrowed from the appellant. He in any event denies that the loan was subject to an 8% fee.

21. This claim does not form part of the appeal as the Judge ruled, first and foremost, that the claim does not fall within any of the gateways in CPR 6.37 and Practice Direction 6B for service out of the jurisdiction and there is no appeal against that determination[3].

(ii) The Project Fees claim

22. Second, the appellant claims that, in August 2006, the first respondent personally engaged him, pursuant to an oral agreement made in Tehran (but said by the appellant to be subject to English law), to provide consultancy services in relation to the MCCI Project. The appellant asserts that he was to be paid Project Management Fees of US$20,000 per month and a Project Bonus of US$1,000 for each telephone mast handed over to MCCI. The appellant further claims that on 4 February 2011 he orally agreed with the first respondent that payment of outstanding fees due under the consultancy agreement (then US$240,000 in management fees and US$1,669,000 in bonus fees) would be deferred until the conclusion of the Arbitration, together with interest at 7% per annum.

23. The first respondent accepts that the appellant was engaged by the second respondent as a consultant on the basis of the fee arrangement alleged, but denies any personal liability, denies that any sums are outstanding in respect of management fees and denies the agreement to defer payment, submitting that the claim is therefore statute-barred.

(iii) The Arbitration Fees claim

24. The appellant claims that, at his meeting with the first respondent on 4 February 2011, it was agreed that the appellant would assist with the Arbitration and that the first respondent (alternatively the second respondent) would pay him between 8% and 12% of any payment made by Nokia, depending on the amount. The appellant further asserts that in August 2016, whilst both he and the first respondent were in England, they reached an agreement on the telephone (subject to English law) to compromise the sum due to the appellant in respect of the Arbitration at US$1,500,000.

25. The first respondent denies the claim in its entirety, asserting that the appellant's assistance with the Arbitration was covered by his existing consultancy fees.

FCO travel advice

26. In February 2017 the FCO's advice in relation to travel to Iran included the following:

> "There's a risk that British national and British/Iranian dual nationals could be arbitrarily detained in Iran. In such cases the [FCO] has serious concerns that the subsequent judicial process falls below international standards. The Iranian authorities don't recognise dual

[3] The Judge stated that, even if the loan fee claim had fallen within a gateway, he would not have been satisfied that the courts of England and Wales were the appropriate forum for the claim.

> nationality for Iranian citizens and therefore don't grant consular access for FCO officials to visit them in detention.
>
> ……
>
> You should consider carefully the risks of travelling to Iran. If you choose to travel, you may wish to keep a low profile.
>
> ……
>
> The Iranian legal system differs in many ways from the UK. Suspects can be held without charge and aren't always allowed quick access to legal representation. In the past, consular access has been very limited. The Iranian authorities don't grant consular access to dual nationals.
>
> In some cases, we believe that individuals involved in commercial disputes with Iranian companies or individuals have been prevented from leaving the country pending resolution of the dispute."

27. By August 2018 the above advice had been altered to read "There is a risk that British nationals, and a higher risk that British/Iranian dual nationals, could be arbitrarily detained in Iran…" (emphasis added).

28. Updated advice issued on 21 September 2018 warned dual nationals against "all but essential travel to Iran...".

29. On 17 May 2019 the FCO again updated its advice, warning British-Iranian dual nationals against all travel to Iran, in addition to repeating the warnings that such dual nationals faced a higher risk of arbitrary detention. However, in a later section headed "Dual nationality", the FCO repeated the existing warning against all but essential travel to Iran.

The appellant's continuing connections with Iran

30. The appellant did not dispute the respondents' assertion that, "since at least early 2000s" (that is, after he and his British wife had divorced) he had spent the majority of his time in Iran. On the appellant's own account, from 2005 to 2010 he had been working in Iran (on the MCCI Project), returning to the UK "on average about every 2/3 months". He spent most of 2010 in Iran as he (as well as the first respondent) was subject to a travel ban imposed by the Central Bank of Iran at the instigation of Bank Sepah. In 2011 he spent approximately 8 months in Iran working on the Arbitration and between 2012 and 2016 he worked on the Arbitration "in Manchester, London, Amsterdam, Zurich, Dubai and Iran".

31. From 2016 onwards, the appellant spent even more time in Iran, explaining at paragraph [17] of his first witness statement:

> "Recently, I have spent more time in Iran than I would normally otherwise do. That is because my father, who is 94 years of age, has been very unwell for over 3 years and I have been spending as much time as I can in Iran to be with him whilst I can, although I have still

> been returning to the UK regularly. I understand that doing so does not change my residency."

32. The appellant also accepted (i) that he owns four other properties in Iran (in addition to his marital home), although he stated they are investment properties owned jointly with other members of his family; (ii) that he owns shares in Iranian companies, but stated that he is a passive investor and (iii) that he holds four bank accounts in Iran, but claims that his primary banking is in the UK.

33. The first respondent further pointed out in responsive evidence that the appellants' four brothers also regularly visited Iran, notwithstanding that they hold dual nationality. He emphasised that power within the Iranian government rests with high-ranking figures within the religious establishment, and that the appellant's father was a high-ranking clergyman.

The procedural history of these proceedings

34. The appellant issued the claim form on 28 November 2018, amending and re-issuing it on 28 February 2019. On that date the appellant applied to His Honour Judge Halliwell (sitting as a judge of the High Court) for the WFO and for permission to serve the amended claim form and the Particulars of Claim out of the jurisdiction.

35. In the affidavit sworn by the appellant in support of his applications, the applicant:

    i) stated that he had been resident in England since 1987 and that he owned a property in Manchester. He did not disclose that he owned an apartment in Tehran where his wife of 12 years was living and that he had lived there with her for prolonged periods, particularly in the previous three years, nor that he owned other properties in Iran;

    ii) asserted that he would not receive a fair trial in Iran, referring to delaying tactics and corruption within the judicial system, but making no mention of any concern about travelling to Iran.

36. HH Judge Halliwell made the orders as sought on 28 February 2019, the WFO freezing assets to the value of £2,340,000. The service order also provided for alternative service by email, so the respondents were promptly served with the proceedings.

37. The WFO was continued at the return date on 8 March 2019, the first respondent not attending or being represented. However, the WFO contained the standard provision that it would cease to have effect if the first respondent provided security by paying the frozen sum into court. On 20 March 2019 the first respondent made such payment.

38. On 22 March 2019 the respondents acknowledged service of the proceedings, stating an intention to challenge the jurisdiction of the court. After obtaining an extension of time until 25 April 2019, the respondents filed and served their application to

challenge the jurisdiction on that date[4]. In the same notice, the first respondent applied for the discharge of the WFO and the release of the security he had provided.

39. In his witness statement in opposition to the applications, the appellant referred to the FCO travel advice updated on 17 May 2019 and stated that:

> "33. It is clear from the above that, in circumstances in which the Court were to grant the Applications and I was forced to seek to pursue my claim in Iran, as a dual-national, I would be at risk of arbitrary detention, being held without charge and denied quick access to legal representation. This is particularly concerning to me given the position and status of the Defendants in Iran.
>
> 34. Indeed, notwithstanding my father's current poor health, since the FCO advice (which I believe to be accurate from my own experiences and contacts in Iran) I have not travelled to Iran at all …"

40. At paragraph [47], the appellant added that "my witnesses would be unwilling to travel to Iran for any trial and some (namely those with dual nationality) would face detention if they did".

The Judge's judgment

41. The Judge found that:

i) all of the appellant's claims faced significant difficulties, but had a real prospect of success. The claims based on the original entitlement to Project Fees would be statute-barred, but that would not be a defence to the claim based on the alleged agreement to defer payment of the fees to the end of the Arbitration;

ii) all of the claims, except for the Loan Fee claim, would have passed through a jurisdictional gateway for service out of the jurisdiction;

iii) however, England was not the natural and appropriate forum for the claims (a finding in respect of which the appellant has been refused permission to appeal); and

iv) there was no real risk that the appellant would not obtain substantial justice in Iran due (a) to the nature of the Iranian legal system (another finding in respect of which the appellant has been refused permission to appeal) or (b) the fact that the appellant was a dual national (the finding subject to this appeal);

v) the WFO therefore fell away, but would in any event have been discharged for material non-disclosure. However, that non-disclosure would not have justified setting aside the orders for service out as a costs sanction would have been sufficient.

[4] The application was filed out of hours and was therefore technically out of time, but the respondents were subsequently granted relief from sanctions.

42. On the question of the risk to the claimant as a dual national, the Judge summarised the FCO guidance of 17 May 2019 as follows:

> "29…The guidance…advised British-Iranian dual nationals against all travel to Iran (though at a later point in the guidance this is said to be advice against "all but essential" travel to Iran). The advice explained that there was a risk that British Nationals and even more so British-Iranian nationals could be detained arbitrarily in Iran. It explains that the Iranian authorities do not recognise dual nationality and so the FCO's ability to provide consular support to detained dual nationals would be extremely limited. The guidance goes on to express "serious concerns" about the Iranian judicial processes and their compliance with international standards. However, in context this is clearly a reference to the judicial processes relating to those who have been arbitrarily detained and to the availability of consular access to such persons and so is of very limited assistance in assessing how the Iranian courts would address a commercial dispute such as that between the Claimant and the Defendants."

43. The Judge then referred (at [30]) to the appellant's evidence that, in the light of the FCO advice of 17 May 2019, he had not travelled to Iran since that advice was published. The Judge noted, however, that the appellant's statement to that effect was made on 21 June 2019, so the appellant was referring to a comparatively short period.

44. After outlining the evidence I have summarised above, the Judge further noted the appellant's failure to explain his failure to disclose the scale of his Iranian connections in his affidavit (in particular his 12 year marriage and home in Iran), directing himself (at [35]) that it was therefore necessary to exercise caution in attaching weight to assertions made by the appellant that were not supported or confirmed.

45. The Judge concluded that the appellant's status as a dual British-Iranian national did not give rise to a real risk that he would not obtain substantial justice in Iran. He stated his reasons as follows:

> "36...This is a commercial dispute between private individuals …The Claimant has significant interests in Iran and a wife and a home there. On his own account of matters he has spent prolonged periods in Iran and has recently spent as much time as he can there. He does not suggest that any question of detention arising out of or connected with his dual national status has arisen to date. Those visits have not been since publication of the latest FCO guidance but have been since warnings in similar terms were given and since the claim against the Defendants was intimated...If the Claimant were to fall foul of the Iranian authorities and were to be detained then he would be unlikely to be able to obtain British consular assistance but that is not a sufficient ground for concluding that there is a real risk that substantial justice will not be done in this dispute by reason of the Claimant's dual national status."

The fresh evidence

46. On 25 November 2019 the appellant's solicitors wrote to the court (copied to the respondents' solicitors) to give notice that, notwithstanding the FCO travel advice, the appellant had travelled to Iran to be with his father given his potentially critical medical condition.

47. On 31 January 2020 the respondents served the 6th witness statement of Mark Hastings (Hastings 6), the solicitor with conduct of their case, providing evidence as to the appellant's activities whilst in Iran. Permission to rely on this statement for the purposes of the appeal was granted by Lewison LJ on 27 February 2020. The evidence included the following:

    i) the appellant had travelled to Iran on 20 November 2019. His father had passed away on 21 December 2019 and the funeral was held two days later, attended by a representative of the Supreme Leader of Iran;

    ii) the appellant was still in Iran on 21 January 2020. On that date he was photographed (in jovial mood) as one of the attendees of a meeting in Tehran. At the meeting, which lasted 3 hours, an Iranian technology company known as "Jibimo" (in which the appellant is a shareholder) executed and closed contracts with a new investor;

    iii) the appellant was also actively involved in the affairs of another Iranian company in which he is a shareholder, known as "KiliD". He attended the company's offices in Tehran on 11 December 2019 to meet the CEO and sign a personal request letter for the conversion of shareholder cash into shares;

    iv) the appellant was not reported to have faced any adverse consequences by being in Iran despite his dual nationality.

48. Hastings 6 also referred to letters sent to the appellant's solicitors, asking for confirmation that the appellant had been involved in three sets of civil proceedings in the Iranian courts relating to property disputes. No response had been received to those letters.

49. The appellant served a further witness statement on 17 March 2020 and applied for permission to rely on it at the hearing of this appeal. The respondents sensibly did not object to the evidence being admitted in so far as it responded to Hastings 6, which evidence was to the following effect:

    i) the appellant had been with his father in Mashad, Iran, save for travelling to Tehran on 10 December 2019 to retrieve his father's will (returning to Mashad on 12 December). On 11 December the appellant had visited a Notary in Tehran, and took the opportunity to visit KiliD's office and speak to the managing director. He was asked to sign paperwork in relation to a planned capital injection that he had not participated in (having declined to attend a meeting on 9 December), and that paperwork was sent for him to sign on 16 December 2019. He had not attended for the purposes of signing paperwork and did not do so. The meeting only took place because the appellant was in Iran due to his father's ill-health;

ii) the appellant confirmed the details of his father's passing away and funeral, but denied the implication that he was in some way protected after his father's death due to his father's lifetime of Islamic literature research and teaching;

iii) the appellant stated that he travelled to Tehran on 26 December 2019 and remained there for a month, dealing with his father's affairs;

iv) the appellant confirmed the meeting on 20 January 2020 in relation to Jibimo, but asserted that he was only at the meeting for 1.5 hours. He emphasised that he would not have attended the meeting if he had not been in Iran due to his father's ill-health and passing away;

v) due to difficulties obtaining the renewal of his wife's Iranian passport and subsequent issues arising from Covid-19, including difficulty in booking a flight, the appellant did not return to the UK until 3 March 2020;

vi) the appellant did not dispute that he was involved in litigation in Iran, but as a defendant. He had been involved in one case as a nominal claimant among many, as a co-owner of property. In none of those cases did he provide witness evidence and he did not need to be in Iran for any of them.

50. The evidence to which the respondents did object was the appellant's references to further updates of the FCO travel advice, which the appellant sought to rely upon by way of an additional Ground of Appeal. The updates were as follows:

i) Updated advice of 24 September 2019, in which the FCO continued to advise dual nationals against all travel to Iran, then stated:

> "British nationals, in particular dual British-Iranian nationals but also persons only holding British nationality, face significantly greater risks of arrest and questioning by security services or arbitrary detention than nationals of many other countries…
>
> There is a high risk that British-Iranian dual nationals could be arbitrarily detained in Iran."

ii) Updated advice of 8 January 2020 stated:

> "The FCO advises against all but essential travel to…Iran. However, for British-Iranian dual nationals the FCO advises against all travel to Iran. If you're in Iran, you should consider carefully your need to remain…
>
> There is a risk that British nationals, and a significantly higher risk that British-Iranian dual nationals, could be arbitrarily detained or arrested in Iran…"

iii) Updated advice of 28 February 2020 referred to an increased threat against Western interests and added to previous advice, "If you decide your presence in Iran is essential, you should maintain a low profile…"

iv) Updated advice of 14 March 2020 was to the same effect, but added further information as to potential difficulties arising due to Covid-19.

51. The appellant added the following:

> "Given the FCO advice and the current situation in Iran, I have no intention to travel to Iran for the foreseeable future. Whilst I was prepared to do so to be with my dying father, remain there for the mourning period and to sort out my wife's passport, that is very different to travelling there to pursue proceedings….Moreover, I believe those proceedings would be high-profile in Iran against a member of one of its wealthiest families, in circumstances where the FCO's advice has been to keep a low profile. I have no intention of going to Iran in contradiction to the FCO to pursue my claims. I do not feel safe to do so."

The relevant law

52. The relevant legal principles were common ground and can be summarised by reference to the following authorities.

53. In *Lungowe v Vedanta Resources plc* [2019] UKSC 20 Lord Briggs JSC, at [88], explained the relationship between the question of the proper forum for a claim and whether there was a risk that the claimant would not obtain substantial justice in that forum.

> "Even if the court concludes… that a foreign jurisdiction is the proper place in which the case should be tried, the court may none the less permit (or refuse to set aside) service of the English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction...The question whether there is a real risk that substantial justice will be obtainable is generally treated as separate and distinct from the balancing of the connecting factors which lies at the heart of the issue as to the proper place, but that is more because it calls for a separate and careful analysis of distinctly different evidence than because it is an inherently different question. If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the end of justice."

54. Lord Briggs also emphasised (i) that when a first-instance judge has undertaken a detailed fact-finding exercise in determining whether there is a risk that substantial justice would not be obtained (having read all the evidence and considered the detailed opposing arguments), an appellant faces formidable difficulties in asking any appellate court to overturn it [92] and (ii) where there was evidence from which the judge was entitled to reach the conclusion he did as to whether the claimant would obtain substantial justice, it is irrelevant whether an appellate court, upon a review of the same evidence, might reach a different conclusion [100].

55. In cases where the alleged risk is that the claimant will be unwilling to travel to the natural forum, the question is whether he has shown that he has well-founded reasons why he will not go there: *Cherney v Deripaska (No. 2)* [2009] EWCA Civ 849 per Waller LJ at [27].

56. In *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1WLR 180 at [94], the Privy Council stressed that the relevant question to which the cogent evidence will go is to the *risk* that justice will not be done in the foreign jurisdiction, and that is not necessary to establish on the balance of probabilities that the risk will eventuate.

The appellant's arguments on the appeal

57. The appellant's first contention was that the Judge failed to "grapple" with the question of whether the appellant would travel to Iran, and whether the appellant had good reason not to do so. Thus, in paragraph 36 of his judgment, the Judge focused on the risk the appellant would be detained in Iran, not the risk that he would be unwilling to travel there to litigate in the first place: he failed to appreciate that the reason the appellant could not obtain justice in Iran was that he would not travel there, a stance which was fully justified in view of the unequivocal FCO advice that dual nationals should not travel there.

58. In that regard, the appellant further argued that the Judge did not recognise that the 17 May 2019 FCO update brought about a significant change, in that it advised dual nationals against all travel to Iran for the first time. The appellant further submitted that the Judge was wrong to put weight on the subsequent reference to avoiding "all but essential travel to Iran" because that was obviously in a "boilerplate" section which had mistakenly been carried over from earlier advice. The Judge was therefore wrong, the appellant contended, to put so much weight on his travel to Iran prior to the 17 May 2019 advice.

59. The appellant's second argument was that the Judge failed to attach significant weight to the appellant's concern that he might be prevented from leaving Iran, pointing out that the Judge did not refer at all to the warning in the FCO guidance that individuals involved in commercial disputes have been prevented from leaving Iran, just as he had been prevented from leaving in 2010. The appellant accepted that such restrictions were imposed on defendants to proceedings, but his response was that his claim could be met by a counterclaim, to which he would be the defendant.

60. The appellant's third argument was that the Judge failed to distinguish between travel to Iran for personal reasons (where the risk of arbitrary detention might be lower) and for litigation against the respondents. The Judge should have asked whether the appellant would decline to travel to undertake the latter, and whether that was for good reason.

61. In summary, the appellant submitted that the Judge's approach was that the appellant should be required to travel to Iran to litigate his claims, notwithstanding unequivocal advice from the FCO not to do so.

62. In relation to the fresh evidence and his proposed new ground of appeal, the appellant submitted that the position in Iran had worsened since May 2019 (and the Judge's

decision). The appellant's recent visits to Iran had been to be with his dying father and the meetings he attended were incidental to that reason: it was not possible to infer from such matters that the appellant will travel back to Iran to litigate this case.

Discussion

63. In my judgment the appellant's main criticism of the Judge's decision, that he failed to consider whether the appellant would travel to Iran to litigate, is entirely without foundation. Nowhere in his affidavit or in his first witness statement does the appellant state that he would (or even might) not travel to Iran to litigate his claims. The appellant expressly states in paragraph 47 of his witness statement (without providing particulars) that his witnesses would not be willing to travel, but does not state that he would not be willing to do so. Indeed, the implication is to the opposite effect.

64. It follows that the Judge did not expressly address the issue of whether the appellant would travel to Iran to litigate because the appellant did not present that as an issue for determination. His case was presented on the basis that he would face a risk of arbitrary detention if he went to Iran, and that was the point the Judge addressed. The finding (which was correct in my judgment) was that such a risk was not such as to deprive the appellant of substantial justice in Iran. There is no basis for interfering with that evaluation.

65. It is also plain, in my judgment, that had the appellant asserted that he was unwilling to travel to Iran to litigate, the Judge would have rejected that assertion and would have been right to do so. Whether or not the appellant is technically resident in England, it is clear from the evidence that he has spent as much (and probably far more) time in Iran than England since his divorce from his British wife in 2001 and that, from 2007, he has had a wife and family home in Iran, as well as substantial investments and business interests. In particular, between 2016 and 2019 he plainly spent most of his time in Iran. In that context, and particularly given the caution the Judge rightly adopted as regards the appellant's assertions, any claim that he would not travel to Iran (to litigate, or for any purpose) would have been roundly rejected.

66. I also fail to see any merit in the criticism of the Judge's approach to the 17 May 2019 FCO guidance. His summary of its effect was accurate and it is plain that he was aware that the update was to advise dual nationals, for the first time, against all travel to Iran. It is true that he did not refer to the warning that commercial litigants might be prevented from leaving the country, but it is difficult to see how that gives rise to a risk of not obtaining substantial justice in Iran, particularly when the appellant has a wife and home there and had lived there for most of the preceding three years. Further, as Newey LJ pointed out in the course of argument, the power to prevent a litigant from leaving the country during proceedings appears to be available against Iranian citizens as well as foreign or dual nationals, as evidenced by the fact that the first respondent was so restrained in 2010.

67. The fresh evidence adduced by the respondents further undermines the appellant's new contention that he would be unwilling to travel to Iran to litigate. Despite the 17 May 2019 FCO advice, the appellant travelled to Iran in November 2019 and stayed there for over 3 months, including over two months after the death of his father, engaging in at least two business meetings during that time.

68. Given the extent of the appellant's connections in Iran and his willingness to travel to and work there notwithstanding the FCO travel advice, dating back to 2017, as to the risk to dual nationals of arbitrary detention, it is not seriously arguable that the relatively subtle changes to that advice since the Judge's order in this case have effected a sea-change in the appellant's attitude. The only real change is that the risk is now described as "significantly higher" than for others, rather than just "higher". The appellant's assertion in his most recent statement that he will not travel to Iran as it is unsafe to do so is self-serving, belated and unconvincing. I would therefore decline to admit this further evidence on the grounds that it would not have an important influence on the outcome of the case and, in respect of the appellant's assertion, is not credible.

69. For the above reasons, I would dismiss the Jurisdiction Appeal.

Material non-disclosure

70. If my lords are in agreement with the above disposal of this aspect of the appeal, the question of whether the order should not have been made by reason of the appellant's material non-disclosure does not require determination.

The Costs Appeal

71. CPR 44.2(8) provides that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

72. In *Excalibur Ventures LLC v Texas Keystone Inc.* [2015] EWHC 566 (Comm), Clarke LJ rejected the proposition that the test for the sum to award was the "irreducible minimum", emphasising that the question is what is a "reasonable sum on account of costs". He further stated:

> "What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject…to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure if the range itself is not very broad."

73. The respondents' total costs of the proceedings were £633,000 (on which no VAT was chargeable), described by the Judge as "an eye-watering sum".

74. In determining the reasonable sum for a payment on account, the Judge adopted the middle of the three approaches suggested by Clarke LJ in *Excalibur*, referring to the endorsement of that approach by Leggatt LJ in *Dana Gas v Dana Gas Sudek* [2018] EWHC 332 (Comm) at [6]:

> "A logical approach is to start by estimating the amount of costs likely to be recovered on a detailed assessment and then to discount this figure by an appropriate margin to allow for error in the estimation."

75. Taking that approach, the Judge considered the amount of likely recovery. He noted that the appellant's costs had been just under £263,000 including VAT, but also recognised that the matter had complications arising from the need to obtain evidence from overseas and the fact that the appellant raised new points that needed to be "chased down and answered". The Judge also bore in mind repeated warnings that disputes as to jurisdiction must not be allowed to get out of hand or involve disproportionate sums being spent. The Judge concluded as follows:

> "21. At the moment I am engaged in an estimating exercise. Taking account of the fact that an element of those costs are to be awarded on the indemnity basis and also taking into account the points made by [the respondents] I nonetheless cannot conceive that the figure on detailed assessment will exceed £450,000 and that might well be a generous figure."

76. The Judge then considered what discount to apply, stating:

> "22…In my judgment the discounting should be quite substantial given the scale of the sums though I have to guard against double discounting given that I have already discounted the £633,000 figure by a significant sum."

On that basis, the Judge arrived at a figure of £325,000

77. The appellant accepted the very limited basis on which this court could interfere with the Judge's exercise of his discretion in this regard, referring to the well-known principle identified by Brooke LJ in *Tanfern v Cameron Macdonald* [2000] 1 WLR 1311 at [32]:

> "…the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible."

78. The appellant contended that, in taking the figure of £450,000 as an estimate of the costs the respondents were likely to recover, the Judge did indeed stray outside the bounds of reasonable disagreement. Mr Goodfellow, on the appellant's behalf, argued that that was an "astonishing" sum, divorced from the reality of the sum the respondent might ultimately be awarded. He suggested that £200,000 would be a very good recovery.

79. In my judgment the level of the respondents' total costs, whilst perhaps on the high side, is not particularly surprising in the context of proceedings in the Business & Property Courts which involved a worldwide freezing injunction and a two-day hearing on jurisdiction and discharge, with both leading and junior counsel instructed. That remains my view even though the sums at stake were relatively small in

Business and Property Court terms: the appellant chose to apply for draconian relief, did so without making full and frank disclosure and raised a panoply of issues and arguments throughout the proceedings. The costs of defending such proceedings with vigour will necessarily have been very substantial, regardless of the sums claimed.

80. In that context, the Judge cannot be criticised for taking a starting point of £450,000, particularly as the costs relating to the WFO were awarded on an indemnity basis. Further, his application of a 28% discount (in arriving at a figure of £325,000) appears entirely reasonable. Whilst I might have ordered payment of a slightly lower sum, the sum chosen by the Judge was well within the ambit of his discretion.

81. It follows that I would also dismiss the Costs Appeal.

Conclusion

82. For the reasons set out above, I would dismiss both aspects of this appeal.

Lord Justice Newey:

83. I agree.

Lord Justice Floyd:

84. I also agree.