Neutral Citation Number: [2020] EWHC 3430 (Ch)

Case No: PT-2020-000587

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST

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

Date: 15 December 2020

Before :

SIR ALASTAIR NORRIS

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Between :

PDVSA SERVICIOS S.A.	**Claimant**
- and -	
(1) CLYDE & CO LLP	**Defendants**
(2) PETROSAUDI OIL SERVICES (VENEZUELA) LIMITED	

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Graham Chapman QC and Anthony Jones (instructed by **Gresham Legal**) for the Claimant
Charles Dougherty QC and Luka Krsljanin (instructed by **Clyde & Co LLP**) for the First Defendant
David Allen QC and Michael Ryan (instructed by **Kerman Legal Limited**) for the Second Defendant

Written submissions received 30 October 2020 and 6 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MEADE

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment is to be handed down by the judge remotely by circulation to the parties' representatives by e-mail and by release to Bailii. The date for hand-down via e-mail is 10.30am on 15 December 2020.

Sir Alastair Norris:

1. I must now deal with matters consequential upon my judgment determining the Part 8 claim issued by PDV, the neutral reference to which is [2020] EWHC 2819 (Ch) ("the main judgment"). I shall adopt the definitions used in the main judgment.

2. The first matter to address is costs as between PDV and Clyde.

3. There is no dispute between PDV and Clyde that the starting point is the general rule in CPR 44.2 that the unsuccessful party should pay the costs of the successful parties. Nor is there any dispute that Clyde is the successful party and (in view of the terms of the indemnity contained in clause 6.3 of the Tripartite Agreement) entitled to have its costs assessed on the indemnity basis: Alafco Irish Aircraft Leasing Sixteen Ltd v Hong Kong Airlines [2019] EWHC 3668 (Comm).

4. The dispute between PDV and Clyde is whether such an order should be made simply in relation to the costs of the action (so sweeping up all interlocutory applications including those where costs were reserved) or whether the costs of certain interlocutory matters should be the subject of discrete and different orders. As to this dispute, PDV appear (in a letter dated 28 October 2020) to accept that the costs incurred by Clyde (i) in consequence of the *ex parte* hearing on 4 August 2020 (ii) of the application dated 6 August 2020 for continuation of the injunction (including the costs relating to the original return date) and (iii) of the applications dated 18 and 21 August for discharge of the injunction and Defendants' summary judgment (including the costs of the hearing before me on 23 and 24 September and the written submissions following it) should all be treated as costs of the action.

5. This means that the dispute is confined to the costs incurred by Clyde in connection with POS' applications (i) for a variation of the injunction granted by Zacaroli J so as to mandate a continuation of the existing escrow arrangements relating to the periodic payment to POS of operational expenses and legal expenses (reserved by the order dated 14 August 2020); (ii) for the joinder of the NCA ("the joinder issue") (reserved by order dated 19 August 2020) and (iii) for a declaration that monies not held by Clyde subject to the Tripartite Agreement but by Clyde & Co in its client account for its client POS were not the subject of the injunction (reserved by order dated 26 August 2020).

6. On interim applications where the outcome is driven by practical considerations (such as the desire to cause the minimum of injustice until the rights and wrongs can be sorted out) costs are generally reserved because it is not possible fairly to decide who is the successful party. There may, of course, be particular features of the application or the detail of its conduct which make it just to make a final order about the costs of the application: and there may be cases that are so straightforward that an order for "costs in the case" can be made. But where, as here, the judge hearing the interlocutory application reserves the costs of the application to some later occasion and does not reserve those costs to himself or herself, it may, I think, be taken that that judge regards later events as being more likely to have a significant bearing on the just order for the costs of the application (though not determinative of it) than the detail of the conduct of the hearing before him or her. After all, the judge who eventually deals with costs will by then know "the big picture" but will not know the minutiae of earlier hearings, and it is not in the interests of justice and the efficient use of Court time to re-run those earlier disputes purely to sort out the costs. The orders I propose adopt this approach.

7. I hold that applications (i) and (iii) (to which Clyde was a necessary party as escrow agent) arose directly out of the terms of the injunction which PDV sought from Zacaroli J and are to be determined by reference to its fate. PDV submits that it did not actively oppose any of the relief sought in these applications. But it was the terms of the injunction which it obtained *ex parte* (and so without affording the opportunity for any input from Clyde) that raised the doubts. In relation to (i), with a little more thought PDV could have crafted the injunction it sought in terms which confined its scope to the direct consequences of the award which it was seeking to annul in Paris (and did not extend to arrangements which arose, not out of the award itself, but out of earlier procedural directions intended to govern the position pending the delivery of a final award). In relation to (iii) PDV simply failed to distinguish between the separate roles of Clyde (as escrow agent) and Clyde & Co (as solicitors for POS). This muddle infected the terms of the injunction sought and needed to be sorted out. Applications (i) and (iii) were part and parcel of the wrongly obtained injunction and in my judgment Clyde's costs in relation to them are part of the costs of the action. This is one of the risks inherent in PDV proceeding without notice.

8. As to the joinder issue, this arose out of an order of the Malaysian Court which predated the delivery of the final award and the application for an injunction. It presented a different potential restraint upon Clyde's ability to comply with the final order of the arbitral tribunal. As such it is a discrete matter which Snowden J has reserved to himself and in which I do not intend to become engaged.

9. I will therefore order that PDV shall pay Clyde's costs of the action (save for those reserved by the order dated 19 August 2020 to Snowden J), such costs to be assessed on the indemnity basis in default of agreement.

10. The second matter to address is a payment on account of those costs. Having considered the terms of CPR 44.2(8) (that the Court will order an interim payment unless there is good reason not to do so) it is in my view just to make an order for an interim payment of costs. PDV does not contest this. The question is as to the amount.

11. Clyde has served schedules of costs which (excluding the joinder issue) total £99,650. It is submitted on behalf of Clyde that in accordance with the decision in Excalibur Ventures LLC [2015] EWHC 566 (Comm) at [22]-[23] the task in hand is to assess "a reasonable sum on account of costs"; it is not to seek to ascertain the irreducible minimum of the costs likely to be awarded on assessment. That task involves at the least (i) making an estimate of the likely recovery subject to a margin for error in estimation; (ii) having done so, to take due account of the means of the parties, the imminence of any assessment, and the difficulty of recovering any overpayment; but subject to that (iii) in general seeking to fix a figure not too much below the estimate. PDV does not argue against this approach. Nor does it contest that the proper outcome of the process is an order that PDV should pay 90% of Clyde's estimated costs. The precise sum is £89,685. I shall so order.

12. The third matter to address is costs as between PDV and POS. The two disputes here relate to the scope of the order, and to the basis of assessment. As to scope, PDV acknowledges that POS is also a successful party and should as such have its costs of the action. But there is again a dispute over costs which have been reserved to the judge dealing with the return date of the injunction. I have identified the relevant applications in paragraph [6] above. I would dispose of them in the same way as between PDV and Clyde. The applications (i) to mandate a continuation of the existing escrow arrangements relating to the periodic payment to POS of operational expenses and legal expenses and (ii) for a declaration that monies held by Clyde & Co in its client account for its client POS were not the subject of the injunction both arose out of the terms of the Order of 4 August 2020 (upon which those affected by it had not had the opportunity to comment).Those who have to abide by the order and give effect to it are often alert to ambiguities which escape an ardent applicant seeking to get the maximum protection. On the other hand, the application to join the NCA arose out of an entirely separate potential restraint.

13. I will therefore order that PDV shall pay POS's costs of the action (save for those reserved by the order dated 19 August 2020 to Snowden J).

14. As to the basis of assessment POS asks for its costs to be assessed on the indemnity basis: unsurprisingly PDV resists such an order. POS relies upon the decision in The Brilliante Virtuoso [2019] Costs LR 2019 as containing a review of the applicable considerations. Counsel submits:

    (a) That the discretion is a wide one and is not confined to cases of moral blameworthiness on the part of the paying party, but in fact there is such blameworthiness here both because of PDV's decision to make serious allegations about the involvement of POS in the 1MBD scandal and because of the failure of PDV to disclose adverse comment upon its conduct both by the Tribunal and by the Court of Appeal;

    (b) That the discretion is exercised in relation to cases that fall outside the norm, and that this is just such a case both because no cause of action was identified and because its objective was to freeze the funds due to POS without satisfying the stringent requirements for the grant of a freezing order or providing the safeguards normally associated with such an order;

(c) That this claim having been dismissed summarily it can be categorised as weak, speculative or opportunistic - in particular because it failed to identify any express words which created any proprietary rights or the basis for the implication of any relevant term;

(d) That the failure to join POS to the original claim was extraordinary.

15. I do not regard this case as sufficiently apart from the norm to order that POS shall receive its costs without the restraint of proportionality and with the benefit of the doubt being given to it on all individual items. At its heart this was an attempt by PDV to preserve the proceeds of the escrow account pending a decision by the French Court as to the validity of the award; no final relief was being sought against or affecting POS. An inappropriate means was used to achieve that objective: what at first sight seemed to be a serious argument (sufficient to persuade Zacaroli J to grant short term interim relief) proved on examination to lack legal coherence. But not every case that is summarily dismissed warrants an order for indemnity costs. In bitterly contested long-term litigation PDV took the opportunity to discredit POS, justifying it by the need to explain the context of the annulment proceedings. In response POS took the opportunity to accuse PDV of wholesale non-disclosure. One criticism by POS was plainly justified: the failure to inform Zacaroli J of the findings adverse to PDV relating to its conduct of the legal dispute. One criticism was plainly wrong and had to be the subject of an unreserved apology. The remainder proved not to be relevant to the decision whether to continue the injunction: but insofar as they have a bearing on costs I hold that PDV's evidence contained sufficient material to justify the course taken by it before Zacaroli J and I would not have refused to continue the injunction solely upon the ground that the original had been obtained by means the material non-disclosures complained of by POS. Both sides then fell into the trap of debating at length POS's involvement or non-involvement with the 1MBD scandal, a matter upon which (as both sides recognized at the hearing) I could not adjudicate. Indeed, POS did not submit that the French proceedings could be seen, even upon a cursory glance, to be totally without merit. The failure to join POS at the outset was a procedural misjudgment; but not one which, in the event, had any material consequences. It neither derailed nor diverted the proceedings. Overall this was, I think, ordinary hard fought commercial litigation in which each party must be prepared to justify its expenditure: a judgment which I make upon these proceedings, uncoloured by the behaviour of PDV in earlier litigation or in the Arbitration.

16. The fourth matter to consider is a payment on account of costs. I have set out my approach in paragraphs [10] and [11] above. Excluding the costs of the joinder application relating to the NCA POS's scheduled costs totalled £849,496: and it seeks an order for the interim payment of £500,000 (roughly 60% of those costs). There are, it seems to me, areas of vulnerability in this schedule (though I do not seek to intrude upon the jurisdiction of the costs judge who must be entirely free to reach his or her judgment). The first is that the overall sum seems high for 4 interlocutory hearings spread over 8 weeks (even allowing for the fact that they relate to some $300 million). The second is that it includes the fees of two leading and two junior Counsel, and the need for such a team was not apparent from the nature of the issues or the conduct of the hearing before me. The third is that Counsel's fees (*ignoring* the fees of the second team) amount to over £525,000:

that seems exceptionally high for work over 8 weeks. I consider an interim payment of £350,000 to be just. There are various routes to arrive at that sum: the simplest being to disallow the costs of the second Counsel team in its entirety and then to take 50% of the remaining balance to allow for reductions on the grounds of proportionality or excessive rates/inappropriate work allocation or debate about 1MBD of little value. That sum is higher than the schedule of its costs prepared by PDV (not least because POS adduced expert evidence of French law but PDV did not). But I have not been too anxious to reduce the figure of £350,000 because (as I write) any overpayment is likely to be set off against PDV's outstanding liability to pay an award sum of $88 million which is entirely unaffected by the French proceedings.

17. The fifth matter to address is a dispute over the terms of the order. There are two disputes. In the main judgment I declined to continue the injunction originally granted by Zacaroli J on 4 August 2020. POS suggests that effect be given to this decision by an order in the following form:-

> "The 4 August Order is discharged in its entirety *save that the cross-undertakings in damages given at Schedule B of the 4 August Order shall continue."*

The necessity for the words in italics is disputed by PDV on the ground that they are not standard and are potentially confusing. I agree: for how long do the undertakings continue and what brings them to an end? There can be no suggestion that by refusing to continue the injunction I am somehow revoking the 4 August 2020 Order or releasing PDV from the undertakings which it gave. I consider that a more accurate formulation of an order giving effect to the main judgment would be

> "The injunction granted by 4 August Order shall not continue and is hereby discharged."

If the 4 August Order has caused loss to POS, then POS can ask the Court to decide whether it should be compensated for that loss.

18. The second dispute relates to a paragraph in the draft order which provides that the costs of the consequential matters are costs in the proceedings. PDV submits that that is the position in any event unless the Court makes a different order, and that I might wish to do so in the light of success or failure upon individual disputes. I accept the POS draft which I consider fairly disposes of the costs of bringing the trial to a conclusion.

19. The sixth matter to address is permission to appeal. PDV seeks to appeal on the ground that my conclusion is wrong in law or that PDV has suffered from a serious procedural irregularity.

20. I do not consider that there is a real prospect of demonstrating that my conclusion is wrong in law. The question which I addressed was whether the Tripartite Agreement upon its true construction created a trust of the escrow monies: paragraph [30] of the main judgment. I answered that question in paragraph [45]. I accept that the same words may strike different minds differently. But since PDV did not identify any clear words which it said imposed a trust and given the reluctance of the Courts to introduce trusts into commercial arrangements in the absence of clear words I consider my decision to be in line with the mainstream of decided cases.

21. I do not consider that my conduct of the hearing contained any serious procedural irregularity. At the conclusion of the hearing I thought that I had not been referred to certain Court of Appeal authorities that struck me as potentially relevant. These cases did not contain some arcane learning but were cases that would be known by Chancery practitioners dealing with escrow arrangements. I invited written submissions upon them, giving PDV seven days in which consider whether the cases were relevant or irrelevant, provided guidance or were distinguishable. PDV went first because it bore the burden of making out its case. Clyde and POS responded. It is a mischaracterisation of my judgment to say that I decided the case upon grounds that were not argued. I decided the case on the grounds that were argued (as is apparent from paragraphs [30]-[45]) but taking account of orthodox law laid out in Court of Appeal decisions upon which all parties had an opportunity to comment. A judge is not bound to ignore Court of Appeal decisions just because the parties do not refer to them in argument: he or she may take them into consideration provided that a fair opportunity is afforded to the parties to make submissions concerning them.

22. I refuse permission to appeal.

23. Counsel will please agree a form of order reflecting these determinations.

Insert Judge title and name here :

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