Neutral Citation Number: [2023] EWHC 2348 (Ch)

Case No: FL-2019-000015

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST

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

Date: 22 September 2023

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

GALAPAGOS BIDCO S.A.R.L **Claimant**

- and -

(1) DR FRANK KEBEKUS
(2) GLAS TRUST CORPORATION LIMITED
(3) GLOBAL LOAN AGENCY SERVICES LIMITED
(4) GLOBAL LOAN AGENCY SERVICES LIMITED
(5) GLAS TRUSTEES LIMITED
(6) DEUTSCHE TRUSTEE CIOMPANY LIMITED
(7) SIGNAL CREDIT OPPORTUNITIES (LUX) INVESTCO II S.A.R.L
(8) GALAPAGOS S.A

Defendants

- -
- -

DAVID ALLISON KC and **RYAN PERKINS** (instructed by **Kirkland & Ellis International LLP**) for the **Claimant**
BEN SHAW KC (instructed by **Keidan Harrison LLP**) for the **First Defendant**
TOM SMITH KC and **HENRY PHILLIPS** (instructed by **Sidley Austin LLP)** for the **Second to Fifth Defendants**
ALAIN CHOO-CHOY KC and **BEN GRIFFITHS** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Seventh Defendant**

- -

Approved Judgment on Costs

This judgment was handed down remotely at 2pm on 22 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

THE HONOURABLE MR JUSTICE TROWER

Mr Justice Trower :

1. This judgment is concerned with the costs of the proceedings in which I granted some but not all of the declaratory relief sought by Bidco and dismissed Signal's counterclaim for alternative declaratory relief. The reasons for the order I made are explained in a judgment I handed down on 28 July 2023 (neutral citation number [2023] EWHC 1931 (Ch)). In the order I made at the time of hand-down, I gave directions for the questions of costs and permission to appeal to be determined on paper and for written submissions to be filed by the parties. In this ruling I shall adopt the abbreviations used in my main judgment.

2. Bidco seeks an order that Signal be ordered to pay its costs of the proceedings on the standard basis. It submitted that it is plainly the successful party and that Signal is plainly the unsuccessful party for the purposes of CPR 44.2(2)(a). It said that the general rule should be applied. It also seeks 25% of its costs against Dr Kebekus.

3. Signal accepted that Bidco has been successful in obtaining the majority of the declarations sought and is therefore to be characterised as the successful party. It was right to adopt that line, because the declarations necessary to confirm the effectiveness of the restructuring were made, while the declarations sought by Signal to undermine its effectiveness were refused. Looking at the substance and reality of the result of the proceedings as a whole, common sense compels the conclusions that Bidco won and Signal lost.

4. The general rule is important. The consequence of a party being the successful party, has been explained in the following summary of the law in the White Book: Civil Procedure (2023 edn) at paragraph 44.2.13:

> "On numerous occasions the Court of Appeal has emphasised that where a particular party is the successful party it is important that proper weight be attached to that and that judicial reasoning towards a costs order which justice requires should start with the general rule that the unsuccessful party should pay his or her costs".

5. Furthermore, the Court of Appeal has made clear on a number of occasions that the mere fact that the winner fails on some issues is not sufficient to justify its disapplication. As Jackson LJ made clear in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 at [62], one of the reasons for this is predictability. If alternative points are unreasonably taken that is one thing, but as Simon Brown LJ said in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 "in almost every case even the winner is likely to fail on some issues". That is not of itself sufficient to justify a disapplication of the general rule: see also *Sharp v Blank* [2020] EWHC 1870 (Ch) at [7].

6. However, Signal submitted that, although it was the unsuccessful party, there are a number of reasons why as a matter of principle no order for costs should be made in Bidco's favour.

7. The first substantive point is that Bidco sought declaratory relief in order to confirm its position not just against Signal but against all the holders of the HYNs. It said that Bidco would have had to bring a claim for declaratory relief in any event, because there were a number of other holders who indicated that the restructuring did not comply with the terms of the ICA. It submitted that in those circumstances, the court would have required adversarial argument before granting the declaratory relief sought, which is something for which Bidco itself would have had to pay whatever the result. Signal submitted that Bidco should on any view only be entitled to its costs to the extent that its opposition to the relief sought increased the costs that Bidco would otherwise have incurred.

8. I do not consider that it is possible to conclude that these proceedings would have been necessary even if Signal had not taken the attitude that it did. The evidence showed that the dispute was driven by Signal. I think the probabilities are that, absent Signal, they would not have been considered necessary and would not have been brought.

9. Furthermore, I do not accept Signal's characterisation of the nature of the dispute and I agree with Bidco's submission to the effect that this was hard-fought adversarial litigation in which Signal was engaged in a hostile root and branch attack on the restructuring. In my view it was clear from the outset that Signal was determined to mount a challenge, which it sought to do not just in England but also by initiating or standing behind proceedings initiated in New York, Luxembourg and Germany. I accept that Bidco had no option but to seek the declaratory relief it sought.

10. In short, I am satisfied that the primary cause of Bidco's decision to litigate (and of the GLAS Defendants' decision to support Bidco's position in the litigation) was the nature and extent of Signal's challenge to the restructuring, which it was reasonable for Bidco to regard as oppressive and relentless and in respect of which English legal proceedings to confirm its validity were required. There is no basis for not applying the general rule on this ground.

11. Signal also relied on the fact that it made many offers to mediate the dispute well in advance of the trial, which were not accepted by Bidco, with the result that no mediation between the parties ever took place. Bidco submitted that a mediation was inappropriate and would be unlikely to have achieved anything because it was designed to do no more than extract a ransom payment. It also said that in any event it made an offer to discuss a commercial deal at principal level which was never taken up and made an offer to settle which was rejected without a counter-offer being made.

12. I was not shown any details of Signal's repeated requests to mediate, nor was my attention drawn to any specific settlement correspondence which ought to be taken into account when determining the just order as to costs. In all the circumstances, Signal has not demonstrated that a failure to mediate should form any basis for not applying the general rule, but nor is there any properly evidenced reason to conclude that such discussions as there may have been between the parties should provide further reason for its application.

13. More significantly, Signal submitted that a material part of the costs of the proceedings were incurred in relation to the out of the money express or implied term (the additional construction point), introduced belatedly by Bidco, which was an argument without any real merit. It was said that this argument should be treated as a different issue on which it succeeded and that, notwithstanding the principles I summarised at the beginning of this judgment, the order for costs should reflect that fact. It submitted that this meant that Bidco should pay its costs of this part of the proceedings, which it estimated as being all of its disclosure costs, all of the factual evidence, all of the experts reports and 65% of the trial costs.

14. Although Signal based this argument on the court's jurisdiction to make an order relating only to a distinct part of the proceedings (CPR 44.2(6)(f)), the relief it in fact sought was an order for payment of a proportion of the costs (CPR 44.2(6)(a)), recognising the provisions of CPR 44.2(7). This line of authority is exemplified by *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at [27], which makes clear that this may be an appropriate course where it is alleged that the successful party has lost on a distinct issue.

15. In support of its argument, Signal said that the additional construction point raised a series of wholly discrete issues in respect of which there was no cross-over with any of the issues arising out of the main construction arguments on which Bidco won. It said that the point was raised late and dominated the actual hearing. It relied on my description of the effect of the argument as being to expand the ambit of the trial into the investigation of a factual dispute of some complexity on which detailed expert evidence of valuation was adduced, which would not otherwise have been necessary.

16. Bidco said that this was the wrong approach. First, it said that the argument was a reasonable one for it to have run, a submission with which (so far as it goes) I agree. While I found the construction aspect of the point to be unconvincing and reached the conclusion that Bidco was wrong by some margin, it was not unarguable. I do not consider that, in the context of this particular restructuring and, given the nature of the challenge which was mounted by Signal, it was unreasonable for Bidco to seek to have the point tested.

17. However, I do not agree that this is a complete answer to Signal's submission because the additional construction point was an essentially discrete issue and it is very clear that its introduction into the proceedings changed the evidential complexion of the case (adopting the language of Cockerill J in *Deutsche Bank AG v Central Bank of Venezuela* [2022] EWHC 2702 (Ch)). This may justify an issue-based order although, where the point was a reasonable one to have run, the likely consequence is that the successful party will be deprived of its costs of the issue, rather than be required to pay the costs of the unsuccessful party: see e.g. the summary in *Pigot v the Environment Agency* [2020] EWHC 1444 (Ch) at [6(3)].

18. The second reason why Bidco said that this was the wrong approach was that, although it lost on the pure construction aspect of the additional construction point, it won on the question of whether Signal and the holders of the HYNs were in fact out of the money. On the one hand, this did not in the event arise in light of the conclusion I reached on construction, but on the other hand this was the aspect of the additional construction point on which the main part of the costs were incurred and as to which Bidco won and did so convincingly. It was always open to Signal to have

accepted that it was out of the money, but to argue that this made no difference because it was right on the construction argument. It chose not to take that course, and the consequence was that a great deal time and expense was expended at trial on exploring the factual questions on which it lost.

19. In my judgment this is a case in which the order for costs can and should reflect the fact that the additional construction point was run late, was discrete with relatively little overlap with the points on which Bidco won and changed the evidential complexion of the case. However, I do not consider that justice points to an order for costs in favour of Signal both because the point was not unreasonable and because most of those costs were incurred in relation to the question of whether the HYNs were in fact out of the money, a point which Signal could have conceded but on which it lost.

20. I consider that the just approach is to make an estimate of the percentage of the costs which can properly be attributable only to the additional construction point, so that in respect of that percentage, reduced to reflect Signal's loss of the factual element of the out of the money argument, Bidco will not be entitled to effect recovery against Signal. The reduction in the amount to which Bidco is entitled should be limited in this manner because, as I explained in my judgment, the instructions that Signal gave to its expert on the appropriate assumptions were misplaced, wrong and skewed his whole approach. If those instructions had not been given, there would have been no basis on which Signal could properly have contended that it was in the money as at 9 October 2019, and much of the work on this issue would have been unnecessary.

21. Having regard to all of these factors and to the court's obligation to make an order which reflects where the balance of justice lies, I think that the right order is to make a 20% reduction in the relevant amount and direct that Signal pay Bidco 80% of its costs of the proceedings to be subject to detailed assessment if not agreed.

22. The GLAS Defendants also seek their costs of the proceedings against Signal on the grounds that they were the successful party as against Signal. They said that many of the same points which apply to Bidco's claim for costs also apply to them.

23. Signal submitted that this was wrong because the position of the GLAS Defendants was entirely aligned with that of Bidco and they had no separate arguments to make. Signal said that it was irrelevant that the counterclaim for declaratory relief was also made against the Security Agent, because the declarations sought by counterclaim were simply the obverse of the declarations sought by Bidco and would have caused no additional costs. It submitted: "It would be unjust for one defendant to have to bear the costs of another defendant whom the claimant has elected to join to the proceedings simply for the purpose of supporting its claim", particularly where no effort has been made to avoid duplication.

24. The answer of the GLAS Defendants was that the court should not be reluctant to award two sets of costs in this case because, although Signal was in one sense a common enemy, the question of the reasonableness of the costs incurred by all of the parties lined up against Signal is a matter for assessment in due course and not for the order for costs made at the end of the trial (*Bristol-Myers Squibb v Baker Norton* [2001] RPC 1). One aspect of this is whether there has been any unreasonable duplication of effort, which the GLAS Defendants said that they sought in any event

to avoid. They also relied on the fact that they were accused by Signal of taking steps in breach of the ICA, that their interests were different from Bidco's and that there was never any objection to them and Bidco being separately represented.

25. In general terms, I prefer the position of the GLAS Defendants on this point. In my view it was always necessary for the GLAS Defendants to be parties to the proceedings so that they were bound by the declarations sought and it is of no real relevance that they were joined as co-defendants at the election of Bidco, because it was Signal's conduct which made that necessary.

26. It was also always the case that, as fiduciaries owing the duties of agents and trustees to the various groups of lenders and noteholders whose rights were varied by the restructuring, their interests were always liable to diverge from those of Bidco. It was Signal's case that it was the GLAS Defendants (and more particularly the Security Agent) which were acting in breach of the ICA. In the event, that divergence of interest did not emerge, but if there is any ground for asserting unnecessary duplication (and I am far from satisfied that is the case), that is a matter to be taken into account on the detailed assessment.

27. Having regard to all of these factors, I see no reason to take a different approach in relation to the costs of the GLAS Defendants from that which I have determined in relation to Bidco. The right order is to make a 20% reduction in the relevant amount and direct that Signal pay the GLAS Defendants 80% of their costs of the proceedings to be subject to detailed assessment if not agreed.

28. I should make clear that, in reaching that conclusion, I have had regard to the argument made by Signal that the GLAS Defendants should be deprived of their costs both insofar as they related to the evidence of Mr Carne and insofar as they related to consideration of condition (C). I do not consider that this is appropriate, largely for the reasons given by the GLAS Defendants. As to Mr Carne's evidence, at the time the work was done it was reasonably thought by the GLAS Defendants that the evidence was necessary to deal with Signal's case on breach and it was only later that the way the case was ultimately put by Signal made this evidence unnecessary for the trial. As to condition (C), it was not common ground at the outset that the GT Opinion was a valid Financial Adviser's Opinion. That only changed later on. Whether unnecessary work was then done on this issue by the GLAS Defendants is a matter for the detailed assessment.

29. Bidco also seeks an order that Dr Kebekus be jointly and severally liable with Signal for 25% of its costs of the proceedings. The GLAS Defendants do not seek any order against Dr Kebekus and nor (not surprisingly) does Signal. Dr Kebekus submits that the right order is that there be no order for costs as against him and the other parties to the proceedings.

30. In large part, Dr Kebekus took a neutral position in the proceedings and, to that extent, he was neither a successful nor an unsuccessful party. However, he took a positive position on the question of whether or not I should decide the additional construction point and in particular whether I should make any findings of fact on matters which were in issue in the German Claw Back Action. He argued in the alternative that if the court were minded to grant the relief sought by Bidco, the court should order that he cease to be a party to the proceedings, leaving him free to reargue

points in the Claw Back Action should he choose to do so. He was unsuccessful on both these points.

31. I agree that Dr Kebekus is to be treated as an unsuccessful party on the issues on which he was not neutral. However, I do not agree with Bidco's submission that this necessarily justifies the order for costs sought in the light of two considerations in particular.

32. The first consideration is that, once the jurisdictional dispute was out of the way (as to which Bidco's costs have already been disposed of by Zacaroli J), Dr Kebekus' role in the proceedings was limited to the issues which I have identified. Only a small amount of time both at the trial itself and in the preparation of the case for trial related to those issues. My assessment is that 10% would be a more accurate reflection of the extent of the costs attributable to the points on which Dr Kebekus was unsuccessful than the 25% sought by Bidco.

33. The second is that Signal has accepted (see e.g. para 11.2(b) and fn 4 of its written opening for the trial) that it is funding the German insolvency proceedings. It appears therefore that Dr Kebekus will have a claim over against Signal in the event that he is required to pay. Bidco submitted that an order against Dr Kebekus is an important additional protection for it, because there are real doubts that Signal itself is able to pay. I have not been shown the evidence which justifies its assertion that Signal's going concern status rests on a pledge of support from its ultimate parent company, but taking that assertion at face value, it seems to me that this is of more relevance to the issue of whether a third party costs order is justified against the fund manager which is said to have controlled Signal and conducted the litigation (together with any funders) than it is to the question of whether an order against Dr Kebekus, in respect of what is on any view a very small proportion of its costs, is justified

34. Mr Shaw also advanced an argument that rule 12.47 of the Insolvency (England and Wales) Rules 2016 should be applied to Dr Kebekus as a German insolvency office holder by analogy. This rule provides that English office holders will not be personally liable for the costs of proceedings to which they are made party unless the court otherwise orders. It is, however, only a presumption and, even if the terms of rule 12.47 were to be applicable which they are not, I have decided that the circumstances of the case justify an order for costs against Dr Kebekus.

35. In light of my conclusion that 10% reflects the extent of the costs attributable to the points on which Dr Kebekus was unsuccessful and having regard to the issues which did arise in the proceedings, I have reached the conclusion that the just order is that Dr Kebekus should be ordered to pay 8% of Bidco's costs of the proceedings to be subject to detailed assessment if not agreed. This reflects a liability for 10% of the costs for which Signal is liable to Bidco, and is the just result in respect of that element of the argument on which he was unsuccessful.

36. Bidco and the GLAS Defendants also seek a payment on account by Signal pursuant to CPR 44.2(8). This requires me to identify a reasonable sum to be paid before a detailed assessment unless there is good reason not to do so. In the normal course a reasonable sum will be an estimate of the amount that will be awarded on a detailed assessment with an appropriate margin for error (per Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [23]).

37. The sums claimed are very substantial indeed, although both of the claiming parties say they are proportionate to the nature and complexity of the matters in issue in the proceedings. The total figure on Bidco's statement of costs amounts to £4,942,323 of which they seek £3,459,626 or 70% as a payment on account. The total figure on the GLAS Defendants statement of costs is £4,420,962.31 of which they seek £2,500,000 or c.60% as a payment on account.

38. The GLAS Defendants have provided a detailed breakdown, but Bidco has not. The absence of a detailed statement is not of itself an objection to ordering a payment on account, but the court must be satisfied that it is able to make a proper estimate of the likely recovery and the effect of a lack of detail is that the margin for error is likely to be more consequential. However, I do not consider that this is a case in which either the relatively sparse level of information provided by Bidco or the very substantial sums claimed of themselves mean that there is good reason not to order a payment on account.

39. In setting the right figure, I have regard to the factors said to justify these enormous sums which include the fact that the proceedings involved an attack on a €1 billion restructuring in the financial list, the great importance of the proceedings for Bidco and the GLAS Defendants and their respective businesses, the complex and specialist nature of the issues and the hard fought nature of the litigation. I have also given careful consideration to the explanation of what was done during the relevant periods, most particular in the costs skeleton prepared on behalf of the GLAS Defendants.

40. I accept that this litigation was always going to be expensive. I also agree that Signal's approach to challenging this restructuring was wide ranging. These are all good reasons for why it may have been reasonable for Bidco and the GLAS Defendants to devote considerable resources to the litigation. Nonetheless, the case was not evidence-heavy and disclosure was limited. At the end of the day, the case turned and was always going to turn on the true construction of the ICA. While important and in some respects complex, the proceedings culminated in a 7 day trial with one witness of fact and two experts. It could not properly be described as heavy commercial litigation.

41. Having regard to these factors, I consider that real questions of proportionality arise and that the amounts certified by Bidco's solicitors are very substantially more than the amounts which are likely to be recovered on a detailed assessment. The hourly rates were very substantially in excess of the guideline hourly rates (in some instances more than double). I also think that is not unreasonable for Signal to contend that the evidence preparation costs were very significantly greater than is to be expected in a case of this type and the levels of cost for pre-action work, statements of case and service raise legitimate concerns that an insufficiently rigorous approach has been take to distinguishing costs which are properly attributable to these proceedings and costs which were incurred in the more general challenges to the restructuring. Furthermore, counsel's fees were very substantially more than those incurred by Signal.

42. Similar issues arise on the statements prepared by the GLAS Defendants. They have given more detail than Bidco and have broke down their statement by reference to three periods and have explained the work which was carried out during those periods. I have given those descriptions careful consideration and have looked at the

detailed criticisms of the amounts made by both Signal and Dr Kebekus. As with Bidco, I consider that the amounts certified by the GLAS Defendants' solicitors are very substantially more than the amounts which are likely to be recovered on a detailed assessment.

43. In short, on the information now available to me, I consider that there will be a substantial reduction of the claims of both Bidco and the GLAS Defendants on a detailed assessment. Having regard to the *Excalibur* test, I think that the appropriate estimate allowing a reasonable margin for error is a figure in each case amounting to c.45% of 80% of the amount claimed in Bidco's and the GLAS Defendants' respective statements. The payments on account will be £1,780,000 for Bidco and £1,590,000 for the GLAS Defendants.

44. Bidco also seeks an order for a payment on account by Dr Kebekus. I have considered whether, on the particular facts of this case, the second of the considerations I have outlined in paragraph 33 above amounts to a good reason not to make a similar order against him. The importance which Bidco says it attaches to a claim against him focuses on its recognition that Signal is the principal party against whom it considers it is appropriate to effect a recovery, not Dr Kebekus. However, I do not think that of itself is a good reason not to make an order for payment on account as a matter of principle.

45. The figure for which he will be jointly and severally liable with Signal to make a payment on account to Bidco will be £220,000, which is marginally less than 45% of 10% of the amount claimed in Bidco's statement.

46. Bidco also seeks an order for the payment of interest pursuant to CPR 44.2(6)(g) from the time of paying those costs to the time at which interest will start to run under the Judgments Act 1838, i.e. the date of making this order. In principle, I see no reason not to make an order to that effect, which is an order that is routinely made to reflect the fact that the successful party has been out of pocket from the time of payment.

47. As to the rate, Bidco seeks 1% over base. Signal submitted that Bidco has not adduced any evidence that it would have earned interest on those sums which should either disqualify it from receiving any interest or at least limit its recovery to base. Bidco argues to the contrary and points out that its own cost of borrowing is in fact well in excess of 1% over base: the new notes which I referred to in my judgment were 7.775% SSNs and I am told have a yield to maturity of 9%.

48. I agree with Bidco's position on this point. I think that the right order is the one which is sought namely to set the rate at a commercial rate of 1% over base.

49. Signal also seeks an order under CPR 40.8(1)(b) that statutory interest on costs should only run from 3 months after the date of the court's order in reliance on the approach adopted by Leggatt J in *Involnert Management Inc v Aprilgarage Ltd* [2015] 2 CLC 405. In the absence of such an order, Judgment Act interest (which will be higher than the commercial rate) runs on an order for costs from the date of the order I will now make, not from the date of the assessment: *Hunt v RM Douglas (Roofing) Ltd* [1990] 1 AC 398.

50. This submission was not developed in the written argument, but I think that the important principle for present purposes can be divined from [23] of Leggatt J's judgment:

> "Fifth, in terms of what justice requires, I do not think it just to make an order under which interest begins to run at the rate appropriate for unpaid judgment debts before the paying party could reasonably be expected to pay the debt; and, in a case where the court has ordered a suitable interim payment to be made on account of costs, I do not think it reasonable to expect the party liable for costs to pay the balance the debt until it knows exactly what sums are being claimed by the party awarded costs and has had a fair opportunity to decide what sums it accepts are properly payable.

51. Bidco simply said that it would be wrong to delay the date when interest begins to run under the Judgments Act, because it would leave it out of pocket. However, this does not address the point discussed in *Involnert* which is concerned with the differential between the judgment rate and the commercial rate for a limited period after the date on which the House of Lords has concluded that interest runs on an order for costs, not the question of whether or not interest should be paid at all.

52. It is well established that the court will not routinely make such an order, but one of the circumstances in which it will do so is where there are real issues of proportionality and reasonableness on assessment, particularly if large amounts of costs are in issue: see in particular the pithy summary of the position given by Arnold J in *Generics (UK) Limited v Yeda Research and Development Co Ltd* [2012] EWHC 2283 (Ch) at [1].

53. In my view, those factors are present in the current case. The order I will make, is similar to the one made by Hamblen J in *Standard Chartered Bank v Ceylon Petroleum Corpn* [2011] EWHC 2094 (Comm) at [26] to [28]. In respect of the payment on account which has been ordered, interest will accrue at the Judgments Act rate from the date of the order I will now make. In respect of the disputed balance, there will be a limited postponement of that higher rate for the 3 month period sought by Signal.

54. Signal also seeks permission to appeal. Its draft grounds of appeal challenge the conclusions I reached on the true construction of the ICA and reiterate the arguments which I considered and addressed in my judgment. I reached a clear view on the merits of those arguments and do not consider that Signal's grounds or appeal have a real prospect of success. Permission to appeal is therefore refused.

55. The parties should agree and submit for the court's approval a minute of order which reflects the matters I have determined in this judgment.