Neutral Citation Number: [2020] EWHC 1359 (Comm)

Case No: CL-2018-000026

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 2 June 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

ROMAN PIPIA	**Claimant**
- and -	
BGEO GROUP LIMITED	**Defendant**
(formerly known as BGEO GROUP PLC)	

- -
- -

Andrew George QC, Paul Burton and Timothy Lau (instructed by **GSC Solicitors LLP**) for the **Claimant**
Sonia Tolaney QC and Natasha Bennett (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing date: 21 May 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.

Covid-19 Protocol:
This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00 am on 2 June 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. I handed down judgment on 26 February 2020 on an application by the defendant ("BG UK") that sought a declaration, for the purposes of Extended Disclosure in this Claim, that documents held by its direct and indirect subsidiaries, JSC BGEO Group ("BG Georgia") and JSC Bank of Georgia ("BoG"), are not and never have been within its control ("the Control Application"): [2020] EWHC 402 (Comm). On that date, with the agreement of the parties, I adjourned the hearing on the judgment (including as to costs) so it could be listed for a full day in combination with the restored second case management conference to deal as fully as possible with whatever directions were needed in respect of Extended Disclosure pursuant to the Disclosure Pilot Scheme under CPR PD 51U. That hearing took place as a remote hearing hosted via Skype for Business on 21 May 2020.

2. After oral argument from Ms Tolaney QC for BG UK and Mr George QC for Mr Pipia to supplement their full and helpful skeleton arguments, I decided and ordered that the costs of and occasioned by the Control Application were to be costs in the case. I indicated that I accepted Ms Tolaney's overarching submission that it was not appropriate to apply to the Control Application the rule that costs follow the event, treating the event as BG UK's failure to secure the relief it had sought; and that taking account of the factors that were relevant in the particular circumstances of the Control Application, the right order was for costs to be in the case. I said I would provide more detailed reasons in writing, in deference to the substantial arguments that had been presented. This judgment now provides those more detailed reasons.

Principles

3. In this jurisdiction, the general rule is that the unsuccessful party in civil litigation will be ordered to pay the costs of the successful party: CPR 44.2(2)(a); but the court may make a different order: CPR 44.2(2)(b). In deciding what costs order, if any, to make, the court has regard to all the circumstances including the conduct of the parties, whether a party has succeeded in part where it has not succeeded fully, and any offer of compromise that is admissible for consideration when it comes to costs: CPR 44.2(4). On this occasion, neither side said there was any offer of compromise to be taken into account.

4. It is common for a substantial, contentious, interlocutory application to be treated as an event in its own right within a Claim, to which to apply that general rule of costs following the event. The fact that significant interlocutory battles are frequently treated in that way must not be taken too far, however. The court must be satisfied on each occasion that the particular interlocutory battle, and the outcome on it, was one in respect of which the just approach to costs is to treat it as a separate event so as to trigger the general rule, bearing in mind that a final trial still awaits.

5. Where the general rule is applicable, the court should not lightly depart from it, i.e. should not without good reason order something other than that costs follow the relevant event: see, e.g., *London Borough of Tower Hamlets v London Borough of Bromley* [2015] 2271 (Ch) at [9], *per* Norris J; *Fox v Foundation Piling* [2011] EWCA Civ 790 at [62], *per* Jackson LJ.

6. It will not be necessary, to explain the decision I took as to the costs of the Control Application, to deal with the applicable principles in any greater detail.

Application to the Facts

7. The Control Application was a substantial, contentious, interlocutory battle, because of Mr Pipia's reliance on Georgian law and his claim that there was a more wide-ranging control arrangement than that constituted by the 30 March Letters, as I construed them in my main judgment. It was BG UK's application, not Mr Pipia's, but it was not launched out of the blue, albeit Mr George QC suggested it was issued precipitately, a point to which I shall return shortly. As I explained in the main judgment, the Control Application was issued to bring to a head the issue raised by Mr Pipia (not by BG UK) over whether BG UK should be giving disclosure of BG Georgia's and/or BoG's documents.

8. Mr Pipia raised that issue, and BG UK launched the Control Application, without Mr Pipia or those representing him having any knowledge of the 30 March Letters. Thus, Mr Pipia's case, upon the basis of which he raised the issue that triggered the application, was the factual case summarised in my main judgment at [35], a case that failed, and his case as to BG UK's rights under Georgian law dealt with in the main judgment at [71*ff*], a case that I concluded achieved nothing for Mr Pipia that was not achieved by the 30 March Letters. Though I found it convenient in the judgment to take the two parts of Mr Pipia's case in the order I have just stated, the case under Georgian law was Mr Pipia's primary case in the application. His case that there was a control arrangement on the facts was only ever his alternative case, and the case as to the 30 March Letters that succeeded was only a fall-back position within that alternative case that emerged following the testing of BG UK's hard-line primary case during Ms Tolaney QC's opening submissions.

9. If upon receipt of the Control Application, seeing the 30 March Letters for the first time, Mr Pipia had been content to limit himself to argument as to their meaning, effect, and continued existence, the very substantial interlocutory battle that ensued, with its heavy focus on Georgian law (so far as the generation of costs is concerned) should not have resulted. Ms Tolaney QC suggested that the Georgian law case accounted for around 70% of the costs of the application, and that seems realistic, even if I could not make any exact finding.

10. Furthermore, as I also noted in the main judgment, the natural applicant in relation to the question of BG UK's control, if any, over documents held by BG Georgia or BoG, was Mr Pipia. I reject the contention that BG UK acted precipitately. Being (i) the natural applicant, (ii) the party with the burden of persuasion that BG UK's Extended Disclosure exercise should extend to the Subsidiaries' documents (and, what is more, adopting as he did the stance that there should be Model D Extended Disclosure by BG UK of its Subsidiaries' documents), and (iii) the claimant, it was Mr Pipia's primary responsibility to ensure that the issues were fully ventilated prior to, and ripe for determination at, CMC2 before HHJ Pelling QC, more than six months before, in the event, the Control Application as issued by BG UK came on for hearing before me. Ms Tolaney QC gave that the forensic flourish of saying that by issuing the Control Application, BG UK was merely being "*the grown up in the room*" that one of the parties had to be. I do not go so far as to say that Mr Pipia was conducting his case in an immature fashion, but the underlying thought is sound. It was and is

essentially irrelevant to how, in fairness, the costs generated should be borne, that BG UK rather than Mr Pipia was the party that made sure the nettle was grasped, as it had to be.

11. What matters therefore is not so much that BG UK rather than Mr Pipia took the decisive action, so as to bring matters to a head, thereby becoming the applicant, but whether in substance it is possible to say that the outcome of the Control Application involved a successful and an unsuccessful party to which it is meaningful, first, and just in all the circumstances, second, to apply the general rule. For that, Mr George QC pointed to the fact that by the Control Application BG UK sought a declaration that none of the Subsidiaries' documents were or ever had been in BG UK's control, and I refused that relief. Indeed, it was agreed at the hearing on which this is the judgment that the primary order consequent upon the main judgment was this, namely that, "*The application for a declaration made by the Control Application be dismissed*".

12. But that does no more than seek again to take advantage of the fact that BG UK took the initiative by issuing the Control Application. Had Mr Pipia done so, I am confident he would have sought relief, whether by way of declaration or simply by way of Extended Disclosure directions as regards the Subsidiaries' documents, that equally I would have refused. That is only to say that he would have sought relief consonant with the case he advanced on the Control Application, which involved the wide-ranging suggestion that had been implicit in his solicitors' approach to Extended Disclosure prior to CMC2, namely that by one means or another the Subsidiaries' separate corporate identity did not restrict BG UK's disclosure obligations in relation to their (the Subsidiaries') documents, save only that Georgian banking secrecy laws might mean that BG UK might have an argument whether some of the documents it would have to disclose did not have to be produced either at all or except on special terms.

13. Just as the formal dismissal of BG UK's application for a declaration in the Order consequent upon the main judgment represents and reflects the failure of BG UK's primary position on the Control Application ('no control'), so equally (though it is buried in the detail of the Disclosure Review Document as approved by and attached to that Order) the finalised directions now made for Extended Disclosure represent and reflect the failure of Mr Pipia's primary position ('materially unlimited control').

14. That does not mean, however, that the superficial submission, namely that Mr Pipa won and should have the costs, is turned entirely on its head, to become that BG UK won and should have the costs. Nor does it mean – which was the primary approach advocated by Ms Tolaney QC – that I should treat Mr Pipia as having substantially won on the existence of a control arrangement (albeit not on his primary argument in that regard) and lost on Georgian law. On that logic, bearing in mind the heavy contribution of the Georgian law issues to the generation of costs, Ms Tolaney proposed an order overall that recoverable costs (after assessment or agreement) should be borne 60% by Mr Pipia, 40% by BG UK. BG UK's costs were c.50% greater than Mr Pipia's, so that would result in a significant net contribution by Mr Pipia.

15. I do not adopt that approach, firstly, because I do not think it right to say that Mr Pipia substantially lost on Georgian law. To the contrary, I found that Georgian law did

indeed create in BG UK at least some rights, where BG UK denied throughout that any rights existed, that may have been important and valuable for Mr Pipia when it came to Extended Disclosure had it not been that the 30 March Letters, as I held, did at least as much for him as regards BG Georgia, and more as regards BoG. Nor does that mean that Mr Pipia is to be criticised for relying upon those rights, rather than limiting himself for the Control Application to the 30 March Letters, because BG UK adopted the position that those Letters created no relevant control, in any event none that persisted, for the purposes of Extended Disclosure. I described that position as ambitious, but it was and remained BG UK's stance throughout. Secondly, or it may be another aspect of the same analysis, a dissection of which points of Georgian law were won or lost does not seem to me a useful way here of deciding which party was substantially the winner as to Georgian law. The costs involved in obtaining the evidence, and then developing and presenting the argument, as regards Georgian law, might have been somewhat less had Mr Pipia raised only the points of Georgian law on which he won, but I do not think that would have been so by a substantial margin.

16. There is then a parity of reasoning, upon which it would equally be wrong to say, so far as relevant to a fair allocation of the costs of the exercise, that BG UK substantially lost on Georgian law. The evidence and argument that would have been required, and therefore the cost generated, to see off Mr Pipia's primary case, as BG UK successfully did, as to the nature and extent of BG UK's rights under Georgian law, in my view would not have been substantially less than the parties in fact incurred in the event.

17. Had there been no more than a brief argument over the meaning and effect of the 30 March Letters, in the context of settling directions for Extended Disclosure at a CMC, I apprehend it would not have felt right to treat the control issue as a separate event at all. Any separate costs involved would have been caught up in the general order typically made at CMCs, and made in this Claim, that costs be in the case. As it is, the Control Application it spawned was a substantial, hard-fought, very expensive interlocutory battle (the updated Costs Schedules I was shown for the hearing upon which this is the judgment came to over £800,000 between them). The costs involved were (or costs of materially similar magnitude would have been) required (leaving aside issues of assessment) for either party to defeat the other's primary case, as in the event they both did. But I would not regard it as just to say in those circumstances that there should be no order as to costs. It is not a case of two equally unsuccessful parties, but a 'score draw'.

18. Mr Pipia has established that BG UK has, albeit within limits, a material degree of control over documents that could include important documents in the case though they be in the hands of BG Georgia and BoG. BG UK has established the limits and seen off the suggestion that, in effect, Mr Pipia might be able to secure Model D disclosure from BG Georgia and BoG through the argument of control vested in BG UK. In my judgment, it was therefore fair for the incidence of the costs of the Control Application to be ordered to follow and reflect the incidence of costs generally in the Claim, which will in turn be upon the general rule that the loser at trial pays, unless there be good reason to depart from or modify that rule after trial.

Summary

19. The Control Application as issued by BG UK was a convenient means by which to bring to a head, and obtain the court's determination of, the difference between the parties over whether and if so to what extent BG UK has or has had control over documents held by BG Georgia or BoG such that they might have to be disclosed to Mr Pipia as part of Extended Disclosure by BG UK in this Claim, and how exactly (reflecting the court's conclusions on that) that should be achieved. Which party issued an application to bring that matter to a head is irrelevant to the just apportionment between them of the costs then generated.

20. The result on the Control Application is rightly characterised as a 'score draw'. BG UK did not establish the essentially unqualified negative proposition it sought to establish, but it did ensure that there could be no question of the Model D disclosure from BG Georgia or BoG, via BG UK, that Mr Pipia was seeking to obtain. Mr Pipia did not establish either under Georgian law or under any *de facto* control arrangement that BG UK had the control over the Subsidiaries' documents that he asserted, but he did show that there was control to an extent that could be of real value to him in the Claim (although ultimately only time will tell as to that).

21. It cannot be said that either side is more responsible than the other for the issues raised by the Control Application being as substantial, and expensive to determine, as they were. Mr Pipia is not to be blamed for not limiting himself to the case that succeeded in respect of the 30 March Letters, though in the event I was not able to find that BG UK's rights under Georgian law achieved for Mr Pipia anything not achieved by those Letters, given that BG UK disputed that the 30 March Letters amounted to any relevant control arrangement, and disputed that any arrangement created by them persisted. BG UK is not to be blamed for not limiting its case to an argument about the 30 March Letters, since Mr Pipia's position was that BG UK had control well beyond those letters, (a) under Georgian law, that being in fact his primary case throughout, and (b) because (so he contended) there was a wider control arrangement than that created by those Letters. So it is not practicable or a fair reflection of the outcome to try to associate parts of the costs incurred to different points won or lost on either side, in particular it is neither feasible nor just to separate the Georgian law case and the control arrangement case on that basis.

22. I do not therefore say that the Control Application was no more than ordinary case management, so that for that reason costs should be in the case. I see it as having been an important and substantial interlocutory battle, to which the general rule of costs following the event could have applied and would have been applied if there had been a clear winner and loser; but there was no clear winner and loser, there was instead a 'score draw', and that is why I ordered that the costs be costs in the case.