IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

No. CL-2019-000320

[2020] EWHC 3588 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 10 December 2020

Before:

MR JUSTICE HENSHAW

B E T W E E N :

(1) VICTOR PISANTE
(2) SWINDON HOLDINGS & FINANCE LIMITED
(3) BCA SHIPPING INVESTMENT CORPORATION
(4) CASTOR NAVIGATION LIMITED — Claimants

- and -

(1) GEORGE LOGOTHETIS
(2) LOMAR CORPORATION LIMITED
(3) LOMAR SHIPMANAGEMENT LIMITED
(4) LIBRA HOLDINGS LIMITED — Defendants

MR R. POWER (instructed by Debevoise & Plimpton LLP) appeared on behalf of the Claimants.

MR D. ALLEN QC and MR L. PEARCE (instructed by Campbell Johnson Clark Ltd.) appeared on behalf of the Defendants.

J U D G M E N T

(via Microsoft Teams)

MR JUSTICE HENSHAW:

1 I will deal first with the incidence of costs. I am asked to decide how the costs should fall following my judgment to the effect that the second to fourth claimants should provide security for costs in the total sum of £805,000 to the defendants.

2 The background, briefly, is as follows. Following agreement between the parties, there was existing security for costs in the sum of £500,000. During correspondence in August 2020, which was without prejudice save as to costs, the claimants on 17 August offered to increase the security, following a request from the defendants, to £700,000. The defendants responded on 24 August indicating that they wished to have £1.289 million of security, bearing in mind among other things the lack of explanation that they believed had been provided in relation to the claimants' assets and the proposed change of guarantor which was at that point under discussion.

3 I mention at this point that it is suggested on behalf of the claimants that, as security for costs was being offered, an explanation as to the claimants' assets was beside the point: any such explanation would go only to the *principle* of whether security should be granted. I do not accept that submission. It seems to me that in forming a view as to what *quantum* of security one should find acceptable, it would remain relevant to have a picture of the claimants' assets, which would inform one's assessment of the overall risk of irrecoverable costs in the event of success at trial.

4 Continuing with the correspondence, on 4 September the claimants increased their offer to £750,000. However, on 18 September the defendants replied indicating that they still wished to have explanations. The defendants issued their application on 13 October, seeking security in the sum of approximately £1.3 million.

5 On 20 October the claimants provided a copy of the Pictet letter, referred to in paragraph 11 of my main judgment, as providing some indication of their assets. On 29 October the claimants made an open offer of security of £750,000 without prejudice to the ability of the defendants to seek further security at a later stage. On the following day, 30 October, the claimants served their evidence in response to the security application. On 5 November the defendants indicated that they would accept security of £900,000.

6 On 10 November, with the hearing three days away, the claimants served certain additional evidence which sought to address several of the queries and concerns the defendants had put forward. Having received that evidence, the defendants the following day, 11 November, indicated that they would accept security in the sum of £750,000, on the basis that the costs of the application would be in the case. However, on 12 November the claimants indicated that they were no longer willing to provide £750,000 of security and would contest the application in full.

7 It seems to me that – viewing this matter in straightforward terms – first of all, the defendants have succeeded in their application for security for costs.

8 Secondly, the defendants have bettered the £750,000 of security that was on offer from the claimants. The claimants have submitted that the defendants did not, in fact, improve their position because they have spent approximately £80,000 on this application and so are, in fact, more unsecured than they would have been had they accepted the £750,000 of security. It seems to me that that is not the correct way of viewing the matter. The argument is in a

sense circular, because the question of whether the defendants have worsened their position by £80,000, being the costs of the application, depends on the outcome of the costs of the application itself, which is the matter I am asked to determine. Further, if the claimants' approach were correct, then in assessing whether or not to accept an offer of security one would have to take into account one's own likely future costs of the application, on the footing that if one did not achieve a better outcome than the offer *plus* those future costs then the court would form the view that one had failed to better the offer. That seems to me incorrect in principle. I consider the correct approach to be the traditional one, whereby one simply compares the amount of the offer that has been rejected with the outcome of the application before the court.

9 Thirdly, the defendants were willing to accept £750,000 of security after receiving the claimants' further evidence, but the claimants then withdrew that offer.

10 In all the circumstances, it does not appear to me that the defendants have acted unreasonably in this matter and I conclude that the defendants are *prima facie* entitled to their costs of the application.

11 The only remaining question is whether there should be any deduction to reflect the fact that the defendants failed vis-à-vis the first claimant, Mr Pisante. I consider that there should be some very modest reduction to reflect that point. The defendants sought security against all the claimants but succeeded in obtaining security against only two of them. As a result, the security ordered was expressly discounted as indicated in paragraph 93 of my main judgment. Having said that, the elements of costs relating to the points on which the defendants failed were relatively small. Essentially they concerned only the question of Mr Pisante's residence. The question of his assets was in play in any event, because they were relied on by the claimants in respect of the security application vis-à-vis the other two claimants. Moreover, it was only towards the later stages of the process that Mr Pisante provided fuller information about his residence. The conclusion I have come to is that the defendants should have 95 per cent of their costs of the application.

12 The second issue raised is whether, as the price of obtaining security for costs, the defendants should give an undertaking of the kind referred to in Appendix 10, paragraph 5 of the Commercial Court Guide. That paragraph says:

> "In appropriate cases an order for security for costs may only be made on terms that the applicant gives an undertaking to comply with any order that the Court may make if the Court later finds that the order for security for costs has caused loss to the claimant and that the claimant should be compensated for such loss. Such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant."

13 In the present case, Mr Pisante indicated in his witness statement that if security were ordered, then he intended to transfer sufficient funds into the fourth defendant Castor's account to meet any costs liability, and for a guarantee to be provided by Alpha Bank on behalf of Castor. He added that Alpha Bank was able to offer more advantageous commercial terms than Eurobank, who had provided the existing guarantee, and that this proposed arrangement would ensure segregation of the relevant funds. It is evident, or at least a fair inference, from that evidence that the provision of security would involve at least some costs by way of bank charges and potentially also the tying up of funds that could otherwise be deployed elsewhere.

14 In *Stokors v IG Markets* [2012] EWCA Civ 1706, the Court of Appeal referred to the provision I have just read from the Commercial Court Guide and noted that, as the Guide indicated:

> "… such undertakings are intended to compensate claimants in cases where no order for costs is ultimately made in favour of the applicant."

15 The power to require such an undertaking was considered by Hildyard J in *In re RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch). In that case he required an undertaking in circumstances where security was required from a non-party funder. The judge noted that although such undertakings were not commonplace or inevitable, he did not think it should be considered particularly exceptional for the court to require a cross-undertaking as the price for an order for security to be provided by a non-party funder before the incidence of costs had been determined. The judge referred to the doubly contingent nature of the liability of such a person. The case is also notable for the fact that in paragraph 148, Hildyard J accepted that although the respondent to the application had not put forward any evidence as to any opportunity cost resulting from the giving of security, the fact that there may be such a cost is in the nature of business, and the fact that no particular lost opportunity is identified or quantified does not necessarily militate against requiring the protection of the undertaking.

16 In *Hotel Portfolio II UK Limited v Ruhan* [2020] EWHC 233 (Comm), Butcher J said of this jurisdiction:

> "If there are additional costs of providing the security then they would in principle be claimable under the cross-undertaking. If there are not, then, of course, nothing could be claimed, but it seems to me to be better to deal with the principle of a cross-undertaking expressed in the usual terms now rather than saying that the Claimants should have liberty to come back to apply for a cross-undertaking when they know whether and what additional costs there will be."

It is fair to point out that (as has been submitted to me) it is not clear precisely what arguments were before the judge in that case. It does appear, though, that the factor that influenced the judge to require an undertaking was the possibility of the provision of security giving rise to additional costs.

17 Finally as to the case law, I was referred to the decision of Marcus Smith J in *TBD (Owen Holland) Limited v Simons* [2020] EWHC 2681 (Ch). The judge in that case indicated that the question was whether there should be an undertaking in damages "*to hold the claimant harmless against the costs or loss caused by the order requiring the claimant to provide security*". That wording is, of course, significantly different from the form of order contemplated in the Commercial Court Guide, which is the form of order I am invited to make in the present case. The Commercial Court Guide wording makes no automatic provision for the party providing security to be held harmless: it simply leaves that matter to be determined by the court at a later stage, including the question of whether any compensation should be provided at all.

18 The judge in *TBD* expressed a number of concerns, including difficulty in identifying the contingency that would lead to the undertaking being triggered, and the possibility that extreme consequences might follow: for example, if the provision of security tipped the claimant into insolvency. Those considerations appear to have led the judge to conclude

that the power to require an undertaking was an "*open-ended and dangerous jurisdiction*" which should be exercised only in unusual circumstances.

19 It appears to me, however, that if the form of undertaking sought in *TBD* was indeed the Commercial Court Guide form (as paragraph 2 of the judgment might appear to indicate), then the concerns to which I have just referred do not arise. As to the relevant contingency, the undertaking simply leaves it to the court at a later stage to decide whether compensation should be given, or not, in the event that the provision of security has caused loss. As to the point about consequences, the same applies. It is not necessary to concern oneself, at the stage of requiring the undertaking, about might follow and whether those consequences might be severe: those are all matters for determination at a later stage, taking into account what is just in the circumstances of the case.

20 The defendants in the present case submit that some effect must be given to the words "*in appropriate cases*" in the Commercial Court Guide, and that on the claimants' approach an undertaking would be required in every case. I am not sure I would accept that as a matter of fact. It seems to me quite possible that there may be cases where security, in the form of a parent company guarantee for example, can be provided without any realistic prospect of a financial cost being incurred.

21 In any event, the claimants in the present case drew attention to a number of factors. First, as I have already mentioned, there is evidence to the effect, or from which one can infer, that the provision of security may come at a cost for the claimants. Secondly, this is a case where, some substantial assets having been shown, security has been required in order to allay the concerns of the court and the defendants as to their ultimate availability to meet any order for costs. Thirdly, the claimants make the point that in deciding the application for security I drew adverse inferences from Mr Pisante's unwillingness to provide certain information to defendants whom he was suing for fraud. If the claimants succeed in their fraud claim then Mr Pisante's approach may be seen in a different light. Fourthly, the claimants point out that this is a case involving, essentially, individuals rather than large corporations; and submit that the claimants, in particular Mr Pisante who ultimately (no doubt) will bear any costs of providing security, ought to at least have the possibility of being protected from such costs.

22 Viewing this matter in the round, it seems to me that there is no warrant in the authorities or in principle for taking the view that undertakings should be required only in exceptional or unusual circumstances. It is certainly true that they have not hitherto habitually been sought or required on applications for security in this court but, nonetheless, it seems to me that I should approach the application on its merits. It seems to me that the factors that the claimants have identified – but in particular the points about additional costs, and the status of Mr Pisante as an individual claimant, albeit a wealthy one – do provide sufficient reason why an undertaking in the Commercial Court Guide form should be required as the cost of obtaining security for costs.

CERTIFICATE

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