Neutral Citation Number: [2021] EWHC 1683 (Comm)

Case No: CL-2018-000297

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: 22 June 2021

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

SKATTEFORVALTNINGEN (the Danish Customs and Tax Administration)	**Claimant**
- and -	
SOLO CAPITAL PARTNERS LLP (in special administration) and many others	**Defendants**

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- -

Michael Fealy QC, Jamie Goldsmith QC, Sam O'Leary, Abra Bompas, James Ruddell & James Fox (instructed by **Pinsent Masons LLP**) for the **Claimant**
David Head QC, Tom De Vecchi & Sophia Dzwig (instructed by **DWF Law**) for **Anupe Dhorajiwala**, one of the **DWF Defendants**

Hearing date: 16 June 2021

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Approved Judgment

This is a reserved judgment the application to which of paragraph 2.3 of CPR PD 40E is unnecessary and is therefore hereby dispensed with.
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 22 June 2021.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

1. On 27 April 2021, I handed down judgment following the trial of a preliminary issue, [2021] EWHC 974 (Comm) ('the Revenue Rule judgment'). I concluded that Dicey Rule 3 applied so that at common law all of SKAT's claims fell to be dismissed and that the court was not precluded by the Brussels-Lugano regime from applying Dicey Rule 3 to dismiss claims against Brussels-Lugano defendants (see the judgment at [4] and [20] for how I defined those various terms). By Order of that date, I dismissed all of SKAT's claims and adjourned consideration of consequential matters generally to a hearing on 6 May 2021, with the interim relief obtained by SKAT (a worldwide freezing order and proprietary injunction, 'the WFO') to continue until that hearing.

2. At the hearing on 6 May 2021, I granted SKAT permission to appeal on the Brussels-Lugano issue but refused permission to appeal on the applicability of Dicey Rule 3 at common law. I continued the WFO, in the event without objection (and in the case of various WFO respondents, including Mr Dhorajiwala, by consent), until a further hearing date of 16 June 2021 when there would be substantive consideration of SKAT's application for its continuation or a stay upon its discharge. The particular hearing dates chosen, 6 May and 16 June 2021, were chosen because they were convenient to the court and the parties since they had been reserved for hearings in the litigation not now required following the dismissal of SKAT's claims and gave the parties time to discuss matters and exchange evidence for an orderly disposal of the case. As regards what to do with the WFO, it was explicit from Mr Dhorajiwala in particular (through his skeleton argument for the hearing on 6 May 2021) that the further time between 6 May and 16 June was needed before the parties could fairly be in a position to ask the court to give any consideration to the point.

3. SKAT for its part explained in its skeleton argument for the hearing on 6 May 2021 that it would seek a continuation or deferred discharge of the WFO:

   (i) pending appeal, if I granted permission to appeal, by reference to the approach summarised by Floyd LJ in *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583, [2014] 1 WLR 1264, at [41],

   (ii) for a brief period to enable SKAT to take the question of interim relief to the Court of Appeal without the protection of the WFO being lost in the meantime, following the approach of Warren J in *Metropolitan Housing Trust Ltd v Taylor et al*, unreported, 20 October 2015, if I did not.

4. In the event, for all but two of the respondents to the WFO (Mr Dhorajiwala and Ms Bhudia), the question of whether and if so on what terms any interim relief should continue pending proceedings in the Court of Appeal was resolved without the need for any ruling beyond (where requested) an approval of proposed terms for consent orders. Ms Bhudia is now a litigant in person and presented no argument to the court on the point. However, she did refer in correspondence to particular circumstances that, she said, would create specific hardship for her if the WFO were continued. Mr Fealy QC drew that to my attention and volunteered in the draft Order he put forward a term to meet that concern so as to avoid taking up time arguing over it.

5. This judgment therefore now sets out my reasons for the decision I made at the hearing in relation to the WFO as against Mr Dhorajiwala, which I also applied to Ms Bhudia

subject to the point mentioned in the previous paragraph. My decision, following the approach taken in *Metropolitan Housing v Taylor*, was that the WFO will be discharged as against Mr Dhorajiwala, without further order, at 5.00 pm on Friday 30 July 2021, giving SKAT just over 6 weeks, if so advised, to seek interim relief from the Court of Appeal.

6. Mr Dhorajiwala is domiciled in Dubai. Therefore, in his case SKAT's claims stand dismissed without permission to appeal. By a timely Appellant's Notice dated 21 May 2021 (Court of Appeal Ref. 2021/0956), SKAT has lodged an appeal, including the necessary application to the Court of Appeal for permission, against *inter alia* Mr Dhorajiwala (who is the 20th Defendant to the second of the consolidated Claim Forms, CL-2018-000404). Within that appeal, SKAT has issued an Application Notice dated 11 June 2021 seeking from the Court of Appeal interim relief by way of a continuation of the WFO (or the deferral of its discharge) against *inter alia* Mr Dhorajiwala pending determination of its (proposed) appeal. I envisage that some substantial work may now be required on SKAT's side to refine the material the Court of Appeal may need to consider, so as to confine that application to Mr Dhorajiwala (and Ms Bhudia).

7. In *Metropolitan Housing v Taylor*, at [2], Warren J referred to *Ketchum International plc v Group Public Relations Ltd* [1997] 1 WLR 4, *Erinform Properties Ltd v Cheshire CC* [1974] 1 Ch 261, and *Novartis*, *supra*, concluding (and I agree) that: "*Those cases establish … that this Court should not grant an interim injunction pending appeal where the applicant has lost before it unless a number of conditions are fulfilled, as summarised in Novartis at [41]. That applies even where the order appealed against is the refusal or discharge of a freezing order.*"

8. As I understand it, that was the position in that case. That is to say, the substantive decision Warren J had made had been to refuse or discharge a freezing order after full *inter partes* argument. I do not agree with a submission made by Mr Fealy QC that the approach adopted by Warren J, to which I shall turn in a moment, should be limited by that context. True it is that in that context the decision against the freezing order applicant, in respect of which it has been refused permission to appeal, will itself have concerned whether a freezing order should be granted. That does not detract, however, from the force of what Warren J went on to say in reasoning why (a) it would not be appropriate for the lower court to grant interim relief in the appeal, but (b) that did not preclude the making of an order the effect of which would be to preserve the *status quo ante* the substantive decision (in that case the *inter partes* refusal of interim relief, in this case the final dismissal of SKAT's claims) for a short period sufficient to give the applicant and prospective appellant time to seek consideration of interim relief in the appeal by the appeal court.

9. Indeed, as indicated by the way Warren J expressed himself at [2], the present case is, if anything, *a fortiori* because it involves the final dismissal on the merits of the claims in support of which interim relief had been granted. The argument, if anything but thus rejected by Warren J, would be that a lower court might properly be *less* reluctant to continue relief pending appeal where the decision to be appealed itself concerned that interim relief, since the substantive claims in support of which the appeal court would be asked to say that the interim relief should have been granted or maintained would still be pending before the lower court.

10. I agree with and adopt for the present case, therefore, what Warren J went on to say, at [3]-[4], which was as follows:

> "*3. One of [the Novartis] conditions is that this Court is satisfied that the appeal has a real prospect of success. Clearly, having refused permission to appeal, I do not consider that there is a real prospect of success in the present case. Any application for a further freezing order must be made to the Court of Appeal which has an original jurisdiction to grant an interim injunction pending appeal. It is not a matter for me to express any view on the extent to which the principles explained in Novartis apply when the Court of Appeal is asked to exercise that jurisdiction.*
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> *4. However, the cases where it is said that a court of first instance has no jurisdiction to grant a freezing order pending an appeal are not, I consider, focusing on jurisdiction in the sense that the court has no power at all, but are dealing with the circumstances in which the jurisdiction can properly be exercised. Although I should not, in accordance with established principles, continue the freezing order, or grant a new one, pending the Court of Appeal dealing with the application for permission to appeal, I do not consider that the authorities deprive me of power to grant a freezing order for a short period to allow MHT to apply to the Court of Appeal itself for a freezing order.*"

11. That approach was consistent with a precedent set by Pumfrey J in *Les Laboratoires Servier v Apotex Inc* [2007] EWHC 1905 (Ch) (as reviewed in *Novartis*, *supra*, at [33]-[34]). In that case, Pumfrey J had, exceptionally, granted permission to appeal despite having concluded that the proposed appeal would have no real prospect of success. He therefore considered the question of interim relief pending appeal on that basis, i.e. on the basis that there was no real prospect of success on appeal from the substantive decision. On that premise, he refused interim relief pending the appeal, but granted a short holding injunction to allow the Court of Appeal to consider the question of interim relief for itself. (Jacob LJ in the event agreed that the appeal had no real prospect of success and therefore refused any interim relief: [2007] EWCA Civ 783.)

12. Warren J stated at [5] his conclusion that it was right to exercise jurisdiction in that limited way, to hold the ring. He in fact did so – and I think this the more satisfactory way of expressing the result in this type of case, even if its effect in substance is the same as articulating a continuation or fresh grant of relief – by ordering that the freezing order would be discharged 21 days later, "*giving MHT the opportunity to protect its position by making such application to the Court of Appeal … as it thinks fit*".

13. Mr Fealy QC referred me also to *MMI Research Ltd v Cellxion Ltd et al* (Floyd J) [2009] EWHC 1533 (Pat) and *Virgin Atlantic v Premium Aircraft* [2009] EWCA Civ 1513, [2010] FSR 396; but it did not seem to me they detracted from or gave reason to qualify Warren J's approach.

14. Mr Head QC did not offer any argument against the appropriateness of following that approach in the present case. He accepted and relied on Warren J's proposition in [3] (last sentence) that it is not only unnecessary, but inappropriate, for the lower court to consider or express views as to the general merits of granting or not granting interim relief pending appeal, since the question of interim relief pending appeal is for the

appeal court where there has been a refusal in the lower court of permission to appeal against the decision in that court *prima facie* requiring the discharge of prior interim relief. Mr Head QC made clear, but I did not require him to develop his argument on it, that Mr Dhorajiwala will contend that however matters may have appeared to this court earlier in the litigation when interim relief was considered, it would not be right now to conclude that there is a real risk that he will dissipate assets. Mr Fealy QC made clear that that will be contentious, and that as regards the granting of a freezing order to preserve assets where proprietary claims are asserted SKAT will contend that the applicable considerations are not the same anyway. In my judgment, these and any other points going generally to whether it is appropriate for some interim relief to be granted against Mr Dhorajiwala in the appeal proceedings now issued, including case management questions in those proceedings of how, when and in what sequence that question and the question of permission to appeal should be dealt with, are properly for the Court of Appeal and not for me.

15. The ultimate consideration, I agree with Mr Fealy QC, is to arrange matters so that the Court of Appeal is best able to do justice between the parties. But the court's conclusion that the applicant is pursuing an appeal without real prospect of success properly must drive how that consideration is given effect (*cf Novartis* at [41(5)], which assumes permission to appeal has been granted for an appeal that the court has assessed will have real prospects of success and *for that reason* talks of best enabling the Court of Appeal to do justice "*once the appeal has been heard*").

16. In the present case, subject to what was therefore the main point taken by Mr Head QC before me (as distinct from points that may be taken in the Court of Appeal), that came down to ensuring that SKAT's position is protected for a short period so that it can make its application to the Court of Appeal. Subject (again) to the main point taken by Mr Head QC, the only balance of hardship or injustice that I was called on to consider, therefore, was that involved in contemplating the WFO remaining in place or not during that short period. No even marginal hardship to Mr Dhorajiwala was suggested as being likely to result from the WFO remaining in place for the next few weeks and the Court of Appeal then, within that period, either granting or refusing (as it may decide) whether there should be some interim relief pending the appeal process. By contrast, if the Court of Appeal were persuaded that a WFO should be granted, but between now and when that decision were made none was in place, *ex hypothesi* SKAT would have been exposed during that interregnum to a real risk of dissipation the Court of Appeal had decided should be guarded against by an injunction, and that would be an injustice to SKAT.

17. In my judgment, it is appropriate to leave with SKAT the burden of making and justifying to the Court of Appeal, if it can, any application that may be required for expedited consideration of its interim relief application in the appeal and/or of raising with the Court of Appeal the case management question of how and when to deal with the permission to appeal application, given the request for interim relief, including the fact that the question of interim relief is now live only for Mr Dhorajiwala and Ms Bhudia whereas the question of permission to appeal is live for many more of the defendants. I therefore decided that it was right to follow Warren J in simply specifying a deferred specific date on which the WFO will expire, rather than say it is to continue (or not be discharged) until some uncertain future date by which some particular stage or decision has been reached by the Court of Appeal.

18. Finally, then, the main point taken by Mr Head QC was that I should refuse to defer any further the discharge of the WFO because SKAT had already had the opportunity Warren J had in mind, and I decided that SKAT should have in this case, to get an interim relief application before the Court of Appeal. In short, it was submitted, SKAT should have issued and pressed that application in the Court of Appeal during the six-week period between the two hearing dates before me to deal with consequential matters arising out of the Revenue Rule judgment.

19. In the particular circumstances of this most heavy and complex of cases, that would have been a very disorderly process, cutting directly across the careful directions set by the court, and so far as concerns Mr Dhorajiwala set with his consent, for the question of what to do about the WFO to be considered first by this court on 16 June 2021. As paragraph A1.10 of the Commercial Court Guide (10th Edition) states, the court "*expects a high level of co-operation and realism from the legal representatives of the parties. This applies to dealings (including correspondence) between legal representatives as well as to dealings with the court.*" When on 6 May 2021 the court was being asked to manage and set directions for the question of interim relief to be considered on its substance, in this court, at an agreed later date (in fact, 16 June 2021), it was incumbent on the parties to be fair, clear and open, with each other and with the court, as to what that consideration of substance was likely to involve.

20. The plain effect of Mr Dhorajiwala's consent, particularly in view of the fair notice SKAT had given of the way in which it would put the application (paragraph 3 above), was that any *Metropolitan Housing v Taylor* period of holding the ring, to allow SKAT to approach the Court of Appeal, would follow, not precede, consideration of the matter in this court. The procedural substance was and is that the hearing on 16 June 2021 was the second day of a two-day consideration of consequential matters, the first day having been 6 May 2021, the second day being required because (a) there was not time to deal with all matters that needed to be dealt with in a single day, and (b) the parties needed the time between the two days to put together the material that any sensible first consideration of the question of continuing interim relief required.

21. If Mr Dhorajiwala, through his legal representatives, had in mind an argument that no further deferral of the discharge of the WFO against him could then be proper or appropriate come 16 June 2021 on the very ground that (with his consent) the parties had taken until then before asking for the question to be considered on its substance, and thus that SKAT should have rushed to the Court of Appeal in the meantime in parallel, rendering the further hearing and associated directions in this court, to which he was consenting, a waste of time, it was incumbent on him to make that plain and an abuse to keep it up his sleeve. I did not conclude that Mr Dhorajiwala was practising such an abuse, but infer that it was as afterthought that Mr Head QC ran the argument when the hearing on 16 June 2021 came around. Indeed it was my clear impression from the oral argument (to the extent such a thing can be assessed when sitting remotely) that the manner and extent to which it cut across the court's careful case management of the aftermath of the Revenue Rule judgment had not been appreciated.

22. For those reasons, I regarded it as wrong to propose that the time between 6 May and 16 June, in the particular circumstances of this case, might fall to be counted against SKAT. Further, though the 21 days allowed by Warren J in *Metropolitan Housing v Taylor* might well, I suspect, be ample for many if not most cases, I was concerned that it would be unrealistically tight for this case. Bearing in mind also where we have

reached in the calendar, I judged that it would be sensible and fair to give SKAT the rest of this Term, if so advised, to get the matter before the Court of Appeal. Hence my Order was that the WFO will expire against Mr Dhorajiwala and Ms Bhudia at 5.00 pm on Friday 30 July 2021.