Neutral Citation Number: [2021] EWHC 2282 (Comm)

Case No: CL-2013-000975

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

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

Date: 11 August 2021

**Before**:
**CHRISTOPHER HANCOCK QC,**
**SITTING AS A JUDGE OF THE HIGH COURT**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **AZZAM FAISAL KHOUJ** | **Claimant/ Applicants** |
| **- and -** | |
| **(1) ACROPOLIS CAPITAL PARTNERS LIMITED** | **Defendants/ Respondents** |
| **(2) ACROPOLIS CAPITAL MANAGEMENT LIMITED** | |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**George McPherson** (instructed by **HMA Law LLP**) for the Claimant
**Ian Croxford QC and James Walmsley** (instructed by **Cooley (UK) LLP**) for the **Defendant**

Hearing dates: Submissions on paper only

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**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 11 August 2021 at 2pm.**

.....

**Christopher Hancock QC, Sitting as a Judge of the High Court:**

## Introduction

1. I handed down judgment on this matter on Thursday 24 June 2021 [2021] EWHC 1667 (the "**Judgment**").

2. There are three matters which remain to be determined.

   (1) The scope of Mr Vaghadia's cross-examination: there is disagreement as to the scope of Mr Vaghadia's cross-examination. The Claimant contends that it should not be confined beyond the subject matter of paragraph 23 of his fourth affidavit. The Defendants seek a narrower formulation.

   (2) Defendants' application for permission to appeal: The Defendants seek permission to appeal against paragraph 1 of the order. The Claimant contends that any such application should be dismissed.

   (3) The fixing of the cross-examination hearing: the Defendants propose delaying the fixing of the cross-examination hearing until after the determination of any appeal against paragraph 1 of my order. The Claimants' position is that the hearing should be fixed now.

3. I deal with matters in the order set out above.

## Scope of Mr Vaghadia's cross-examination

4. The Claimant contends that the subject matter of Mr Vaghadia's cross-examination should cover paragraph 23 of his fourth affidavit, without further limitation, whilst the Defendants seek an order confining Mr Vaghadia's cross-examination to the first seven topics identified in paragraph 18 of HMA Law's letter of 17 April 2021 (the "**17 April Letter**").

*The Claimant's contentions in summary*

5. It is the Claimant's case that this proposed limitation on Mr Vaghadia's cross-examination is undesirable because it does not reflect (1) the 17 April Letter (2) the Claimant's submissions at the 23 April hearing (3) the Judgment or (4) the interests of justice.

6. The Claimant addressed the proposed scope of Mr Vaghadia's cross-examination in paragraphs 17 and 18 of the 17 April Letter".

7. In paragraph 17, the letter stated:

> In the light of the matters set out in paragraphs 5 to 16 above, Mr Khouj will seek an order for cross-examination of Mr Vaghadia in respect of the alleged basis of the transfer of Mr Mansouri's

> shares in ASFL to Mrs Kurdi by reference to the account given in paragraph 23 of Vaghadia 4 in the following materials…

The remainder of the paragraph identified eight different categories of documentation and witness evidence.

8. Paragraph 18 stated: "For the avoidance of doubt, the cross-examination will focus on the following issues identified in paragraph 23 of Vaghadia 4", and went on to list eight issues by reference to specific sub-paragraphs of Vaghadia 4. All but sub-paragraphs 23.1, 23.2 and 23.13 were included, which related (respectively) to (1) Mr Vaghadia's account of the alleged meeting on 13 April 2010 (23.1) (2) Mrs Kurdi's alleged signature of the transfer document on 1 June 2010 (23.2) and (3) the discussion between the directors of ASFL (Mr Nabil Chartouni and Mr John Evett) and Mr Vaghadia on 18 January 2011 (23.13).

9. However, the Claimants contend that, on a natural reading of the letter, paragraph 18 did not state that Mr Vaghadia's cross-examination would be confined to the issues set out therein; merely that these issues would be the "focus" of it.

10. At the hearing, the relief sought was described in paragraph 15 of the skeleton as follows: "Against this background, Mr Khouj seeks the following relief (as described in paragraphs 17-19 and 26 of [the 17 April Letter]....an order for cross-examination of Mr Vaghadia in relation to the circumstances in which the ASFL Shares were transferred to Mrs Kurdi by reference to the eight issues identified in paragraph 18 of the 17 April Letter…". The submissions went on to seek an order in respect of the contents of Vaghadia 4/23", and made reference to Schedule 2, which provided a detailed 9 page chronology relating to the transfer of the ASFL shares. Paragraph 1 of the draft order accompanying the Skeleton, included the words: "…such cross-examination to be conducted by reference to the list of issues set out in the Appendix to this Order (the "Cross-Examination Issues")". The Appendix referred to paragraph 18 of the 17 April 2021. The Claimants skeleton relied on Schedule 2, which was not limited to the matters set out in paragraph 18 of the 17 April letter, and the skeleton concluded with the words: "The gaps in Mr Vaghadia's account of the transfer of the ASFL Shares in paragraph 23 of Vaghadia 4 are therefore extensive and call for explanation".

11. The Claimant then relies on paragraph 1 of my judgment, in which I identified the order sought as referable, in particular, to paragraph 23 of Mr Vaghadia's fourth affidavit, which "deals with the circumstances in which the ASFL Shares….were transferred to Mrs Kurdi by reference to the eight issues identified in paragraph 18 of [the 17 April Letter]". It is then pointed out that "the question" before the Court at paragraph 66 of the Judgment is stated to be "whether it would be just and convenient to order the cross-examination of Mr Vaghadia on the limited matters set out in the skeleton argument of the Claimant (i.e. paragraph 23 of Mr Vaghadia's fourth affidavit)". Finally, the Claimant makes reference to paragraph 67 in which I indicated that I was making the order for cross-examination sought "…in relation to the limited matters dealt with in paragraph 23 of Mr Vaghadia's fourth affidavit".

12. Finally, the Claimant goes on to make submissions as to whether it would be "just and convenient" to limit the scope of cross-examination. It is submitted that there is no unfairness in the order proposed by the Claimant since it does not go beyond the submissions made to the Court, which addressed the totality of paragraph 23 of Vaghadia 4; that in the light of the Defendants' past prevarication, late disclosure and delay, the Claimant is seriously concerned that the Defendants will seek to exploit any limitation in the form of order to shut out legitimate lines of questioning about the subject matter of the transfer of ASFL shares (in particular, the critical alleged meeting on 10 April 2010); and that the overriding consideration is that "…the story of the transfer of the shares from Mr Mansouri to Mrs Kurdi be told clearly, by reference to such contemporaneous documents as are available". That is a fortiori where the Defendants have taken such an obstructive approach in the past. The most effective means of achieving that objective is to make an order by reference to paragraph 23 as a whole and without any form of limitation.

*The Defendants' contentions in summary.*

13. By the time of the hearing, the Defendants contend that the Claimant was applying for an order for cross- examination in the terms set out in the draft Order supplied to the Court with the Claimant's Skeleton Argument. The relevant part of that draft Order was in the following terms: "*The Defendants each tender Mr Vaghadia for cross-examination before a High Court judge sitting in the Commercial Court in relation to the contents of paragraph 23 of Vaghadia 4****, such cross-examination to be conducted by reference to the list of issues set out in the Appendix to this Order…***" (emphasis added). The Appendix there referred to included the placeholder:

"*[Insert paragraph 18 of HMA's Law's letter dated 17 April 2021]*"

14. As the position was explained in the Claimant's Skeleton Argument at paragraph 15.1:

*"… The Claimant seeks an order for cross-examination of Mr Vaghadia in relation to the circumstances in which the ASFL Shares were transferred to Mrs Kurdi* ***by reference to the eight issues identified in paragraph 18 of the 17 April Letter*** *" (emphasis added).*

15. As it was explained in the Claimant's Skeleton Argument at paragraphs 84-85:

*"… The Claimant seeks an order for cross-examination in respect only of the evidence set out in paragraph 23 of Vaghadia 4… The 8 issues on which the Claimant specifically seeks to cross-examine Mr Vaghadia are set out in the Schedule to the draft Order…" (emphasis added).*

16. Subject to one point of detail, it is clear that the Court was persuaded to make the Order that the Claimant sought. Paragraph 1 of the Judgment correctly records that the Claimant was seeking an order to cross- examine "*by reference to the eight issues identified in paragraph 18 of a letter dated 17 April 2021 from HMA Law…*". Paragraph 66 refers to the question as being whether it would be just and convenient to

order the cross-examination of Mr Vaghadia "*on the limited matters set out in the skeleton argument of Mr Khouj*". Paragraph 66 states in terms that the Court has concluded "*that it would clearly be just and convenient* ***to make the order sought*****"** (emphasis added). Finally, paragraph 67 concludes that the Court makes "***the order for cross-examination sought****, in relation to* ***the limited matters*** *dealt with in paragraph 23 of Mr Vaghadia's fourth affidavit*" (emphasis added). The reference there to "*the limited matters*" must be a reference to the limited matters in respect of which permission was sought to cross-examine Mr Vaghadia.

17. There is nowhere in the Judgment a suggestion that the Court was persuaded to make an Order broader than that which was actually sought by the Claimant.

18. Nonetheless, the Claimant has, after the hearing, sought a broader order (by deleting the emphasised text in the passage quoted at paragraph 15 above). The Claimant has said that it would be "*artificial*" to make the Order that he had sought: 24 June letter paragraph 2.4. But (quite apart from the irony in the Claimant arguing that it would be artificial for the Court to limit the cross-examination in the way proposed by the Claimant) there is no artificiality in limiting the cross-examination to that which the Claimant sought. The limitation of cross-examination to particular topics is not a device unfamiliar to the Court.

19. It would be a source of real unfairness to the Defendants (and Mr Vaghadia) if the Court were now to order broader cross-examination than that which was sought, the Claimant having framed his application in a particular way (and the Defendants having made submissions accordingly). The argument before the Court on 23 April 2021 was about the application being made, and not about the extended relief now sought.

20. The point of detail referred to above arises out of the manner in which the Court addressed the topic of confidentiality. It is clear from Judgment paragraph 68(2), that the Court was not intending to grant permission for cross-examination of Mr Vaghadia probing the issue of confidentiality. To avoid any risk of scope creep in that regard, the appropriate course is for item 8 (i.e. paragraph 18.8 of the letter of 17 April 2021) to be excluded from the Appendix to the Order. The Claimant's position on this is apparently that no such carve out is "*necessary*". But, in circumstances where the purpose of the Appendix is to define the scope of the cross-examination the sensible course is to exclude any item that is not intended (absent further order) to be within the scope of the cross-examination.

21. I have concluded that, except for the issue of confidentiality, addressed below, it would be inappropriate to limit the scope of cross-examination beyond requiring that it be addressed to paragraph 23 of Mr Vaghadia's fourth affidavit. I consider that the words "by reference to" are to be distinguished from the words "limited to", and that the Defendants seek to read down the generality of the reference to paragraph 23 of the Affidavit in a way that is not justifiable. In the light of the wording of the 17 April Letter read as a whole, and in the light of the manner in which the submissions were developed before me, I am quite clear that my intention was indeed to order cross-examination of Mr Vaghadia on paragraph 23 of his fourth affidavit, as indeed I indicated. Finally, I would conclude that any further limitation renders the task of the

judge hearing the cross-examination fraught with unnecessary difficulty. This may be of less relevance, since I understand that the parties wish me to deal with the cross-examination but nevertheless it is a very real consideration.

22. Accordingly, the order that will be made is in the terms sought by the Claimant. The exception to this is that I do not think I am in a position to deal with issues of confidentiality, and that this will have to be the subject of further consideration. If the Claimant wishes to take issues of confidentiality further, then I consider it will have to lay the groundwork for doing so to a greater extent than it has done to date. A form of words will have to be inserted indicating that the cross-examination will not be allowed to cover issues of confidentiality unless a further application is made in this regard.

**Permission to appeal.**

23. The next topic is that of permission to appeal. It is common ground that the relevant test is that the appeal should have a real prospect of success, and that the test is that applicable to a summary judgment.

*The Defendants' contentions.*

24. Although the Defendants made it clear that their preference would have been for their proposed wording of paragraph 1 of the draft Order to be agreed (and if such agreement had been achieved their preference would have been not to seek permission to appeal but rather to get on with a cross-examination hearing), they also reserved the right to pursue an appeal if no agreement could be so reached.

25. In the event, it has not been possible to reach agreement on paragraph 1 of the draft Order, and the Defendants therefore apply for permission to appeal. Without prejudice to the grounds of appeal that may be developed for the purposes of any subsequent application to the Court of Appeal and/or any appeal, the Defendants respectfully contend the Judgment is founded on (without limitation) the following clear errors of law:

(1) Having correctly accepted the principle that the purpose of this action must be to enable the Claimant to collect in the assets of Mr Mansouri (Judgment paragraph 66(1)), and having correctly accepted the principles to the effect that an order for cross-examination must serve the purpose of the proceeding (i.e. enable the Court process to be "*effective*") and be "*proportionate*" (Judgment paragraph 45), itwas submitted that I then went on at paragraph 66 to apply the "*very low bar*" that I had said at paragraph 45(8)(b) I would not apply, and to fail to apply the principles that I had endorsed. Thus:

(a) It was suggested that I had concluded that it was sufficient that I had concluded that further cross-examination "*may provide*" further information (Judgment paragraph 66(1)) and that further cross-examination "*might advance*" the Claimant's ability to recover assets (Judgment paragraph 66(2**)**), and that this alone was sufficient to make it just and convenient to order cross-examination. That, the Defendants said, is a speculative possibility and not such that enables

the conclusion that cross-examination promotes the purpose of rendering the Court process effective.

(b) Similarly, it was argued that I relied on the proposition that it was "*important that the story of the transfer of the shares from Mr Mansouri to Mrs Kurdi be told clearly*" without any explanation for how this would advance the Claimant's compliance with his duties as Administrator (Judgment paragraph 66(4)); and that I relied on a proposition that certain matters "*require to be explained*" or "*require, or at least deserve, further investigation*" without any explanation for how this would advance the Claimant's compliance with his duties as Administrator (Judgment paragraph 66(5)).

(2) Having accepted that an order for cross-examination should be proportionate (Judgment paragraph 45), and having recorded the Defendants' submissions as to prejudice to them from an order for cross-examination, including from delay (see Judgment paragraph 63), it is said that I then failed to take those matters into account: see Judgment paragraph 66. It was submitted that a failure to take into account such obviously material considerations rendered my exercise of discretion unsafe, and would require the Court of Appeal to exercise the discretion afresh.

26. Further, it was said that if and insofar as I resolved the first issue noted above, such that the scope of the cross-examination is wider than was sought, then there would in addition be a gross unfairness to the Defendants that would itself found a further ground of appeal.

27. Accordingly, the Defendants submitted that an appeal has a real prospect of success for the purposes of CPR 52.6(1)(a), and I was invited to grant permission to appeal.

*The Claimant's contentions.*

28. For his part, the Claimant contended that any application by the Defendants for permission to appeal is hopeless. Briefly:

(1) (Judgment/36-37) on their own case, the Defendants accepted that the Court had jurisdiction to make an order for cross-examination under section 37(1) of the Senior Courts Act 1981, i.e. in any case where it was "just and convenient" to do so;

(2) consequently, even if there is a real prospect of the Defendants showing that the most appropriate source of the Court's jurisdiction to make such an order is not its inherent jurisdiction (as the Claimant submitted), it makes no practical difference: the test to be applied (justice and convenience) is the same;

(3) the application of that test to the facts involves the exercise of a judicial discretion;

(4) to succeed on appeal, the Defendants must therefore show that my exercise of discretion in granting the order for cross-examination "exceeded the generous ambit within which reasonable disagreement is possible"; and

(5) based on the Judgment's comprehensive and careful analysis of the substantive issues (Judgment/46-67), there is no prospect, let alone a real prospect, of the Defendants persuading the Court of Appeal that this very high burden has been met.

*My conclusions.*

29. I can deal with this issue briefly.

(1) It was common ground between the parties that I had jurisdiction to make an order for cross-examination.

(2) I have already concluded that the order that was sought was the broader order that I have made under Issue 1, and not the narrower order for which the Defendants have contended.

(3) I am not persuaded that any of the items put forward by the Defendants in any way suggests that I have erred in the exercise of my discretion.

(4) I accept the submission made by the Claimant that in these circumstances an appeal would have no real prospect of success.

30. Accordingly I refuse permission to appeal.

**Fixing of hearing**

31. The Defendants have proposed that the cross-examination hearing should not be *fixed* until after the final determination of any appeal by the Defendants (or confirmation from the Defendants that no appeal is being pursued). The Claimants oppose this and argue that the hearing should be fixed now.

*The Claimant's contentions.*

32. The Claimant's response to the Defendants' proposal is as follows:

(1) If the Defendants make an application for permission to appeal or permission to appeal is granted, it is self-evident that the hearing should not take place until that application or the appeal itself has been determined. However, the possibility of a future appeal is not a good reason to postpone the fixing of the hearing.

(2) In effect, the Defendants are seeking a stay of the relief sought in paragraph 1 of the Order (an order for cross-examination). However, the general rule set out in CPR 52.16 is that an appeal shall not operate as a stay of any order of the

lower court. The Defendants have not identified the requisite "solid grounds" for a stay.

(3) There are no such grounds. A 1 day hearing in the Commercial Court will not be listed before February 2022. Between now and then, any application for permission to appeal renewed before the Court of Appeal will be disposed of. Delaying the listing of the hearing for several months until that happens will significantly prejudice the Claimant.

33. In the extremely unlikely event that the Defendants were to obtain permission to appeal from the Court of Appeal, the parties can revisit at that stage whether the hearing needs to be relisted to accommodate the timeframe for hearing the appeal.

*The Defendants' contentions.*

34. The only point in issue as between the parties is, where the Defendants seek and have reserved the right to seek permission to appeal, the hearing should not be listed until a date after the disposal/withdrawal of any appeal (and if relevant any application for permission to appeal).

35. It is incontrovertible that it would work unfairness to the Defendants (and Mr Vaghadia) for the cross-examination hearing to go ahead pending a challenge to whether such a hearing should have been ordered at all. Going ahead with the cross-examination hearing would render nugatory any appeal that the Defendants might wish to pursue (save in relation to the question of costs).

36. The obvious procedural solution is for the Order to provide that the hearing be listed after the final determination/withdrawal of any appeal (or if relevant application for permission to appeal), and that is what the Defendants propose.

37. The Claimant's solicitors have indicated that their understanding is that a 1 day cross-examination hearing would not come on in any event until February 2022. However, it is not clear whether that takes into account theproposal that the hearing be listed to take place before the Judge who heard the Application, and in any event such an observation still leaves open the possibility of the hearing being listed for an earlier date. If permission to appeal is granted, the appeal is unlikely to have been heard by February 2022.

38. It may be that the Claimant intends to suggest that there might be a "not before" date for the listing of February 2022, perhaps together with a direction granting liberty to apply for that hearing to be vacated and re-listed should it be likely that an appeal will still be in progress at the relevant time. However, that is not an attractive solution not least because if in the event the Defendants decide not to pursue an appeal (and in the event the Court is able to accommodate a hearing sooner), there will be no good reason to require the hearing to be listed only after some specified future date.

*My conclusions.*

39. I have concluded that this is not an appropriate case for a delay of the listing of the hearing. I accept the submission that no *hearing* should take place until the Court of Appeal has rejected any application or the Defendants have decided not to appeal. However, I also take the view that a hearing can be listed in order to save time, and then, in the event any application for permission to appeal succeeds, that hearing can be vacated. In essence, I take the view that, as a matter of good case management, the listing process should be accomplished as soon as possible, leaving open the possibility of revisiting the date in the light of any decision (by the Defendants or the Court of Appeal) on the grant of permission.