Case No: CL-2021-000376
Neutral Citation Number: [2021] EWHC 3737 (Comm)

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

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 3 December 2021

BEFORE:

HIS HONOUR JUDGE PELLING QC
(Sitting as a Judge of the High Court)

BETWEEN:

CLAVIS SECURITIES PLC & ORS

Claimants

- and -

INTERTRUST MANAGEMENT LIMITED & ORS

Defendants

MS C COOKE appeared on behalf of the First to Fifth Defendants (the "Intertrust" Defendants)
MR ALLAN appeared on behalf of the Sixth and Seventh Defendants (the "BCLP" Defendants)

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. JUDGE PELLING: This is the hearing of an application by the first to fifth defendants and the sixth to seventh defendants for an order that this claim be struck out or that summary judgment be entered against the claimants, Clavis Security, Clavis Options, Digital Asset Partners and Saret Holdings Corporation, on grounds which I will come to shortly when dealing with the substance of the application.

2. The first issue which arises since the claimants do not appear and are not represented, is whether or not service can be proved. I am satisfied that service can be proved on this basis. First, so far as the first to fifth defendants are concerned, by a letter from Bryan Cave Leighton Paisner dated 17 August 2021, the application, draft order and witness statement in support of the application was served by first class pre-paid post on Digital Assets Partners and Saret Holdings Corporation at 86 to 90 Paul Street, London, England, being the address identified on the claim form as being the address for service of the parties.

3. So far as the Bryan Cave parties are concerned, the documentation demonstrating service is not included within the bundle of material, but an undertaking was offered on behalf of those claimants, as there was an undertaking offered on behalf of the first to fifth defendants, to confirm service by first class pre-paid post and exhibiting the relevant letters under cover of which the material was served. On the basis of those undertakings, I proceed to determine this application. It appears that in fact service has taken place because, included with the bundle is a witness statement purportedly from a Mr Paul Anthony of Ajeltake Road, Ajeltake Islands, Majuro, Republic of the Marshall Islands, purporting to be a statement filed and served "… *on behalf of the third claimant* …" and confirming "… *I am duly authorised to do so in opposition to the defendants' application for the claim to be struck out* …"

4. Returning therefore to the application notice issued by the first to fifth defendants, it is simply for orders striking out on the basis that there is no reasonable grounds for bringing the claim, the claim is an abuse of the process because the claim has been brought without the authority of the first and second claimants, that is to say Clavis Securities and Clavis Options, and has been brought for an improper purpose and is a collateral attack on the judgment or order of Mr David Halpern QC

dated 16 July 2021 and in breach of an injunction order made by Mr Halpern against Mr Hussain on 9 July 2020.

5. The Bryan Cave application is brought on essentially the same grounds and is for the same relief.

6. This application is one with something of a history in the sense that it is the latest in a line of cases in which entities, typically entities apparently incorporated in the Marshall Islands, are used by Mr Hussain as a mechanism for bringing claims against companies in which Mr Hussain alleges that the entities concerned have obtained control of **bona fide** and often very substantial **bona fide** companies, for the purposes of then purporting to oust the directors of the companies concerned with a view to gaining control of the assets belonging to the companies concerned. This is said to be a similar claim.

7. Turning then to the heart of the evidence, the key point which underlies each and every one of the allegations which are made in the particulars of claim depends upon an assertion pleaded in the particulars of claim at paragraph 44 under the subheading "*Corporate restructurings on 15 April 2021*". What is pleaded in paragraph 44 of the particulars of claim is this:

> "On 15 April 2021 -
>
> (a) the second defendant was validly and effectively replaced as share trustee with Highbury Investments Limited who consequently holds on trust 49,999 of the 50,000 ordinary shares authorised and issued by Securities;
>
> (b) the entire share capital of Options, being a one fully paid-up ordinary share, was validly and effectively transferred to HIL from the second defendant. HIL in its capacity as member and holder of the 49,999 ordinary shares of Securities and thereby holding 99.998 of the voting rights in Securities, validly and effectively -
>
> (i) replaced the second defendant as company secretary with the third claimant and replaced the third to fifth defendants as directors of Securities with Mr Hussain, HIL and Options …"

8. As will be readily apparent, everything that follows in the pleading depends upon that essential averment. The key point which is made on behalf of each and every one of these defendants is that that allegation is self-evidently false. The basis on which that assertion is made is by reference to the share trust deed relating to the companies with which these proceedings are ultimately concerned. I was taken to one of the share trust deeds but was told all the others were in broadly similar form, a submission that I accept.

9. The key point for present purposes is that in paragraph 9 of the relevant deed under the heading "Appointment and removal of trustees", and in paragraph 9.1 under the heading "Power of appointment", it is provided that:

> "The statutory power of appointing new or additional trustees as modified under this Deed shall apply to this Deed and the Trust and shall be exercisable by the person or persons who are for the time being the Trustees."

10. The key point is that Highbury (or HIL as it is referred to in the pleadings) is not and never has been a body or entity empowered to exercise the powers set out in paragraph 9.1 and thus the whole edifice on which this claim is based falls to the ground.

11. This is not the first time this issue has been considered by a court. It was considered by Mr Halpern in his judgment referred to earlier and led to the order which he made on that occasion in which he declared that Intertrust CSL had been, since 30 May 2006 and remained the share trustee; secondly, that Intertrust CSL has been since 11 April 2006 and remained the share trustee pursuant to the share trust deed of 11 April and therefore the purported resolution executed on behalf of Highbury or HIL purporting to remove Intertrust CSL as share trustee and to transfer Highbury the Clavis shares was invalid and ineffective because Highbury did not hold and never had held the Clavis shares on trust or, for the avoidance of doubt, in any capacity and thus the purported resolutions on which it relies were invalid and ineffective.

12. That in short is the end of this claim because, as I have already explained, the particulars of claim set out precisely what was rejected by Mr Halpern as being the

basis on which the claim is advanced and, therefore, the claim must necessarily fail and be struck out.

13. The position is slightly different in relation to the BCLP defendants for this reason. The claim which is brought against BCLP appears to be for various injunctive, declaratory and monetary relief based on an alleged unlawful means conspiracy. Those allegations are set out in the particulars of claim in section C in and after paragraph 54 of the particulars. I do not propose to lengthen this judgment by setting out in detail what is pleaded in each of those allegations. The key point that arises in relation to each and every one of them is that the allegation could only ever be arguable if it could be demonstrated that at the time the various steps relied upon were taken, the purported appointment of Highbury was valid, whereas, for the reasons I have explained it was not and therefore Bryan Cave Leighton Paisner LLP, who are instructed throughout on behalf of the first to fifth defendants and Clavis, were fully entitled to take the steps that are identified on the instructions of their clients. Therefore, the notion that an unlawful means conspiracy claim can succeed against them is misconceived in essence for exactly the same reason.

14. As I have been recorded as saying in other cases, and in particular the cases in relation to the *Hurricane* litigation, this is regrettably yet another manifestation of broadly the same techniques used by Mr Hussain using entities formed in the Marshall Islands. This is vexatious conduct, which is wasteful both of public resources as well as being a very substantial waste of time and costs for those who genuinely control the entities under attack, at least some of which are publicly owned. This claim must be struck out for the reasons I have identified. It must also incidentally be struck out on the basis that it is a claim brought in breach of the injunction previously granted and also probably on the basis that it is a collateral attack as well.

15. I leave out of account for present purposes whether it is a breach of the general Civil Restraint Order because that gives rise to particular difficulties or potential difficulties which is simply unnecessary for me to address in the circumstances of this case.

16. In the circumstances of this case, the claim must be struck out for the reasons I have given and/or summary judgment must be entered again for the reasons I have given,

but perhaps it does not matter which is which for the effect is the same. Therefore, I propose to grant the relief sought.

(**After further submissions**)

17. The stay application must necessarily fail because it is founded on the basis that an application is to be made in the Chancery Division to stay the orders of Mr Halpern. That is an order which the Chancery Division, as I see it, cannot make because the Court of Appeal has already refused a stay of those orders.

(**Judgment given**)

18. This is an application for an order that the third and fourth claimants pay the costs of the defendants to be assessed on the indemnity as opposed to the standard basis.

19. It is plainly right that the defendants should receive their costs because they have been successful. The further question is whether those should be assessed on the indemnity basis. I am satisfied they should be. The test that has to be applied in deciding whether or not costs be paid on an indemnity basis is that identified by the Court of Appeal in the *Excelsior* case, that is to say it requires a court to identify whether or not the proceedings in respect of which costs are sought involves conduct outside the norm to be expected in relation to commercial litigation in this context.

20. Plainly it is outwith the norm to be expected of commercial litigation for proceedings to be commenced in manifest breach of an order that has previously been made, by reference to allegations which have already been rejected and which allegations cannot be maintained on the documentation which is material for the reasons I have explained. This is a claim which is one which ought never to have been brought and therefore it is right that the defendants should recover their costs on an indemnity basis.

(**After further submissions**)

21. The issue I now have to dealt with is the summary assessment of the first to fifth defendants' costs. As I have already said, those are costs which should be recovered on the indemnity basis for the reasons I gave earlier in this hearing. The question

therefore that I need now to resolve is what work has reasonably been carried out and in respect of that work what reasonable sum should be recoverable in respect of it, bearing in mind that any marginal issues are to be resolved in favour of the receiving party against the paying party because of the indemnity costs assessment basis.

22. The first issue which arises concerns hourly rates. So far as hourly rates are concerned, this is relevant to what constitutes a reasonable amount for whatever work it was reasonable to carry out. So far as that is concerned, the range of hourly rates claimed runs from £250 an hour for a trainee or paralegal equivalent, through to £840 an hour for Mr Gelb, the partner and £710 an hour for Ms McAtominey. This is in excess of the guideline rates identified in the Civil Justice Council Report published with the authority of the Master of the Rolls in April of this year.

23. As is well known, that report distinguishes between a London 2 rate and a London 1 rate, with London 1 being for "*very heavy commercial and corporate work*" carried out by central London law firms, and London 2 which is for all other work carried out by City and central London law firms in the EC, W, WC and SW postal districts.

24. So far as that is concerned, I am prepared to accept that this case is one which arguably falls within the London 1 rate for the reasons which are identified by Ms Cooke in the course of her submissions. That means, therefore, that the hourly rate that ought to be charged is £512 for a Grade A, £348 per hour for a Grade B, £270 for a Grade C and £186 an hour for a Grade D. If an hourly rate is to be relied upon which is in excess of this sum, then it must be justified by reference to the criteria that apply for the assessment of costs, namely that in all the circumstances a reasonable rate is one which is higher than that which is identified in the guideline rates.

25. Ms Cooke submitted I should take that view in relation to this case because of the complexities that arise and because of the background. I am not able to accept that submission. Those are points which go to the hours of work that have been carried out, they do not go to the rates involved. I emphasise that there is a distinction to be drawn between the costs which contractually a party agrees to pay its own solicitor and those which are recoverable following the making of a costs order, even where an indemnity

costs order is concerned, any hourly rate above and beyond the guidelines rates requires to be justified by reference to the criteria contained in the rules.

26. There is no such justification in the circumstances of this case and I have applied the rule which requires marginal issues to be resolved in favour of the receiving party by holding that this case falls within London 1 rather than London 2 rates. I therefore direct that all the work tasks that are identified in the schedule be recalculated applying the guideline rates.

27. The only other issue which arises, as it seems to me, in relation to the sums claimed arise in relation to work done on documents. The standout points are 13.6 hours to prepare the bundle and for the preparing of witness statements a total of slightly over 40 hours, being 8.3 hours of Grade A time, 20 hours of Grade C time and 11 hours of Grade D time.

28. In my judgment, this is in excess of what is reasonable in the circumstances. I accept that this was a piece of work which had to be done properly and required care. I also accept that, because of the involvement of the solicitors personally in all of this, some care needed to be taken at partner level as well. Nonetheless, 40 hours for drafting witness statements which are included in this bundle is in excess of what is reasonable. I reduce the C hours by 5 hours to 15, I reduce the A fee earner time to 6 hours. I leave the D fee earner time as it is.

29. So far as the preparation of the bundle is concerned, I do not at the moment see how that can possibly reasonably have taken 13 hours having regard to the relatively short nature of the bundle and the fact that this is an application which was estimate, I believe, for two hours in duration, although in fact it has taken less time than that. In my judgment, the bundle ought reasonably to have been prepared in no longer than 8 hours and I reduce the Grade D time for that as well.

30. I am prepared to accept that 0.9 hours of C time is appropriate for supervisory work in connection with the bundle, and I leave that as asked.

31. So far as the sums for the schedule of costs are concerned, I am satisfied that those, having regard to the fact this is an indemnity rather than a standard assessment, that the sums claimed are reasonable, likewise, for the preparation of the skeleton argument. So far as counsel's fees are concerned, I am satisfied those are reasonable in all the circumstances, this being an indemnity assessment.

32. Subject to those adjustments, I allow the costs as asked.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge