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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2022] EWHC 1020 (Comm)

No. CL-2020-000784

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 1 April 2022

Before:

HIS HONOUR JUDGE PELLING QC

(Sitting as a Judge of the High Court)

B E T W E E N :

ABU DHABI COMMERCIAL BANK PJSC — Claimant

- and -

(1) BAVAGUTHU RAGHURAM SHETTY
(2) KHALEEFA BUTTI OMAIR YOUSIF ALMUHAIRI
(3) SAEED MOHAMED BUTTI MOHAMED ALQEBAISI
(4) PRASANTH MANGHAT
(5) SURESH KUMAR VADAKKA KOOTALA
(6) PRASHANTH SHENOY — Defendants

MR A. BELTRAMI QC (instructed by Holman Fenwick Willan & Co LLP) appeared on behalf of the Claimant.

MS R. DEN BESTEN (instructed by PCB Byrne LLP) appeared on behalf of the First Defendant.

MR T. PENNY QC (instructed by Farrer & Co LLP) appeared on behalf of the Second and Third Defendants.

MR A. ZELLICK QC (instructed by King & Wood Mallesons LLP) appeared on behalf of the Fourth Defendant.

J U D G M E N T

(Remote hearing via Microsoft Teams)

(Transcript prepared without access to documentation)

JUDGE PELLING QC:

1 For the reasons set out in the written judgment, a copy of which has been supplied to the parties, I am satisfied that there is a real issue to be tried between the claimant and each of the defendants, that the first defendant has been properly served in accordance with section 1140 of the Companies Act 2006 and that, in consequence, the claims against the second to fourth defendants pass through the necessary and proper gateway. I am satisfied also that claims pass through the tort gateway to the limited extent identified in the judgment. However, in my view, (a) there is another forum which is clearly and distinctly more appropriate for the trial of this claim than in Abu Dhabi, and (b) there are no circumstances by reason of which justice requires that this claim be tried here rather than Abu Dhabi, and in those circumstances I am satisfied that I should accept the undertakings offered by the defendants and deal with these proceedings either by way of a stay or otherwise as sought by the defendants.

LATER

2 The only contested issue I have to decide at this stage concerns what is to happen in the event of a breach of the undertakings which I have accepted from each of the defendants. This is dealing with something which I would hope would be profoundly unlikely ever to arise, but the division between the parties is that Mr Beltrami QC, on behalf of the claimant, says that there should be an express recording that the defendants accept that the court would have jurisdiction to determine an application to lift the stay, and to make any orders consequential upon the lifting of a stay, whereas each of the defendants submit that on the established case law, such an express recording is unnecessary and, Mr Zellick adds, may lead to confusion with a foreign court.

3 So far as this last point is concerned, I think that is an illusory point but, in any event, can be catered for by making it clear that the acceptance of jurisdiction is strictly limited to any application by the claimant for to apply to lift the stay in the event of a breach of the relevant undertakings. In my judgment, there is an advantage in recording expressly in the order the concession of the defendants concerning jurisdiction in this limited way, since if an application were to be made, it is entirely possible that I would not be hearing it and all the parties would be represented by other counsel, and possibly other solicitors as well, and it is important that there should be a record of the basis on which the orders were being made.

4 Therefore, the order should follow broadly the form of para.5 of the defendants' draft order but amended in the way that I indicated in the course of argument in discussion with Mr Beltrami, accepting for these purposes that Mr Beltrami has other points to make in relation to para.5, but making the point I have, strictly in relation to the liberty to apply element of it.

LATER

5 The issue I now have to determine is one of principle between the parties as to the consequences of the orders that I have made. Broadly speaking, the claimant submits that the appropriate course to adopt would be to stay these proceedings generally as against the first to fourth defendants and it is accepted that there should be liberty to the first to fourth defendants to apply for any additional relief, including, but not limited to, applying for a declaration that the court will not exercise jurisdiction over the claimant's claims as against

any of the first to fourth defendants, setting aside the service of the claim form on those defendants out of the jurisdiction, and therefore disposing finally of these proceedings.

6 The position adopted by the defendants is that this is inappropriate, that the standard form of order following the conclusions that I have reached are those set out in their draft order, that is to say, a declaration that the court will not exercise jurisdiction, an order setting aside service of the claim form on the first to fourth defendants out of the jurisdiction so as to bring these proceedings as against the first to fourth defendants to an end. Mr Zellick on behalf of the fourth defendant adds that if a stay was to be ordered in the formulation adopted by the claimant then the consequence would be that costs will be incurred by the defendants in applying for the additional orders contemplated by the liberty to apply.

7 The difficulty is created by para.5 of the defendants' draft, which has already been discussed earlier this morning and deals with a liberty to the claimant to apply to lift the stay in the event that the undertakings, which form the basis of the order, are breached. The submission which is made on behalf of the claimant is if there is a declaration to the effect that the court will not exercise jurisdiction, and/or the service of the claim form on the first to fourth defendants is set aside, then, if in the future the claimant has to apply to lift the stay because the undertakings have been breached, then the position of the claimant could be materially prejudiced as a result of the orders having been made. In relation to this issue,

8 In my judgment, the appropriate course is to adopt that which is identified by the claimant. My reasons for reaching that conclusion are as follows. First, I do not consider that the defendants will be in any material respect prejudiced by an order in those terms. They will be able to apply at any stage, and for any reason, for the orders which the defendants seek at this stage, namely the declaration that the court will not exercise jurisdiction and to set aside the claim form.

9 As I see it, there is at least a realistic risk of prejudice, so far as the claimant is concerned, if the defendants' approach is adopted, both by reason of the possibility of the claim form expiring and also the potentially interesting issue as to in what circumstances the court could set aside a declaration granted in the terms sought by para.1 of the defendants' draft order at some later stage. Any technical difficulty arising in relation to that would be entirely unintended, I accept, but it is avoidable if the claimant’s solution is adopted.

10 The only other point which is made, by Mr Zellick in particular, is that costs will be incurred by the defendants in having to return to the jurisdiction and make the necessary application. As to that, there are, as it seems to me, a number of answers. The first is Mr Beltrami's answer, that in reality there will be no need to make any such application at all, the proceedings would simply be stayed as against them and that will be the end of it. Secondly, as it seems to me, prior to making any application, there would of necessity be correspondence between the parties' solicitors with a view to arriving at an agreed position which itself would eliminate most, if not all, of any costs that would be incurred as a result of adopting the approach indicated by Mr Beltrami. Thirdly, it may well be that if an application has to be made, particularly if it is not opposed, then it can be dealt with on paper and, therefore, reduce significantly the costs that will be involved and if an application has to be determined at a hearing then the court will be able to address costs in the usual way. Although the defendants complain about the bifurcated form of order the claimants contend should be made, one has to remember that the reason why this problem arises is because of a problem which Mr Beltrami's client identified in the course of the substantive application which resulted in various undertakings being offered. The undertakings are a

critical part of the solution to this application and it is the consequence of having to have those undertakings in place that the bifurcated approach that I favour has to be adopted.

11 In those circumstances, the structure of the order will be as contended for by Mr Beltrami, that is to say, the proceedings will be stayed generally as against the first to fourth defendants with liberty to the first to fourth defendants to apply for the following additional relief, namely that identified in paras.1, 2 and 3 of their draft order.

LATER

12 The issue that I now have to determine concerns the date when the worldwide freezing order that currently exists should be discharged. The claimant submits that there should be essentially a three-pronged approach to this: if I grant permission to appeal, then I should grant a stay of the discharge of the worldwide freezing order until after final disposal of the appeal. As I understand each of the defendants' submissions, that is not in principle objected to. Therefore, that is an appropriate way to proceed if and to the extent I grant permission to appeal, an issue I have not yet considered.

13 The next issue that arises is what is to happen if I refuse permission. As to that, Mr Beltrami QC on behalf of the claimant submits that a two-pronged approach is required. First of all, it is said that I should direct that the worldwide freezing order should not discharge until after the refusal of any application made to the Court of Appeal for permission to appeal. He accepts, however, that there needs to be a stay for a period that is time limited in the light of the authorities and the points of principle which are made on behalf of the defendants, namely that having taken a decision which leads to the consequence that the worldwide freezing order must be discharged it therefore follows that the jurisdiction to grant or to delay the discharge of the freezing order is significantly constrained, with it being recognised in the authorities that there is such a jurisdiction but that it should be confined in time: with, I think, the longest time so far being about six weeks in the SKAT litigation.

14 Mr Beltrami's second prong is that, in any event, I should direct that in the event that permission to appeal and interim relief is not granted by me, or by the Court of Appeal, then the worldwide freezing order should not discharge until 4.00 p.m. 10 days after determination of the application. The purpose of this is to enable the claimants to apply under section 25 of the Civil Jurisdiction and Judgments Act 1982 for an order for worldwide freezing relief in aid of foreign proceedings.

15 The defendants' position in relation to all of this, is that the jurisdiction not to discharge is limited, for the reasons that I have explained, and should not extend, so it is submitted, beyond the end of this term, that is to say, 13 April and an extension until 10 days after the refusal of the Court of Appeal of permission to appeal, should not be granted by me but should be left to the Court of Appeal, who will be exercising an original jurisdiction in relation to extending the freezing order following the refusal of permission to appeal.

16 Mr Zellick for the fourth defendant, adopting those submissions, says that any continuation as against his client should be regarded as without prejudice because of his submission that no real risk of dissipation has been identified in relation to the fourth defendant and, therefore, he is entitled to apply to have the order discharged on that ground alone. He adds that, in any event, any application under section 25 must be made on notice. So far as that is concerned, in reply, Mr Beltrami that the length of the period of delay before discharge is essentially a matter of judgment which he is content to leave to me, and so far as the long

stop extension to permit a s.25 application to be made, he says there is nothing in the point concerning jurisdiction, because I have as much a jurisdiction under section 37 to grant the orders sought as the Court of Appeal and, therefore, it would be procedurally neater and less risky all round if I were to make the order so that the matter could proceed reasonably seamlessly if the events contemplated by para.12 of his draft order were to occur.

17 So far as the first of these points is concerned, we are rapidly approaching the end of term and whilst I accept there may be duty Lord or Lady Justices available during the vacation period to determine applications of this sort, it is clearly incumbent on the court, if it can, to avoid imposing extreme loads on the Court of Appeal over the vacation period. The difference, in principle, so far as timing is concerned, is between 13 April, for which the defendants contend, and 29 April, which is the date I identified, which is the first Friday of the following term, thereby allowing the Court of Appeal time to consider the issue between now and the end of this term and a few days into the new term. I am entirely satisfied that, having regard to these accidents of timing, 29 April at 4.30 p.m. is the appropriate time to impose.

18 The second issue which arises is whether I should make the order sought under para.12. So far as that is concerned, the choices, as it seems to me, are between any application for permission to appeal to the Court of Appeal including within it an application for an order that in the event permission is refused, then the worldwide freezing order be extended until 10 days after service of the Court of Appeal's order on the claimant and defendants, or me making the order which is sought, which refers to 10 days after the determination of the application for permission by the Court of Appeal.

19 So far as that is concerned, I do not actually see any particular difficulty one way or the other, so far as jurisdiction is concerned, nor do I perceive there to be any obvious risks of danger so far as the claimant is concerned if the issue is left to the Court of Appeal. I accept that I may have jurisdiction to make the order. I accept that I have jurisdiction to delay the discharge of the worldwide freezing order to the extent I have. I accept, however, that this is a rather tension ridden jurisdiction, because it involves continuing a potentially onerous order for a significant period of time after a decision has been taken that the order ought, as a consequence of the other decisions taken, be discharged. In those circumstances, it seems to me that the appropriate course is for the claimant to seek the relief it seeks under para.12 of its draft order from the Court of Appeal in its application for permission to appeal.

LATER

20 This is an application for permission to appeal. The test which applies is that permission must be granted if a judge of first instance concludes that there is a realistic prospect of the appeal succeeding in the Court of Appeal or if there is another reason why permission ought to be granted. The central focus of the application for permission to appeal inevitably is the conclusion I reached concerning appropriate forum.

21 Central to any view concerning forum will be governing law. For reasons which are explained in the judgment, and are, in any event, obvious, there are significant advantages in the courts of the country of the law governing a particular dispute determining that dispute. For present purposes, therefore, the focus was upon Article 4 of Rome II, set out at length in para.66 of the judgment. The focus of challenge in relation to this is to say, first of all, that in relation to Article 4(1), my assessment of where loss occurred is at least realistically arguably wrong, not least because it is said to be inconsistent with a different conclusion I reached in relation to one of the gateways. In my judgment, this submission ignores the

effect of Article 4(2), which provides that where a person claiming to be liable, and the person sustaining damage, both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. The conclusion I reached in relation to that is that each of the defendants, and the claimant, were at all material times habitually resident in the UAE and in Abu Dhabi, for the detailed reasons set out in the judgment. It therefore follows that the governing law of this dispute is the law of Abu Dhabi, applying Article 4(2), unless Article 4(3) is capable of yielding an alternative result. Article 4(3) is one which will apply only in exceptional circumstances and the threshold that has to be overcome before reliance can be placed on Article 4(3) is a very high one, identified in the authorities referred to in the judgment.

22 In my judgment, there is no realistic prospect whatsoever of the Court of Appeal coming to the conclusion that the claimant had a realistic argument that the governing law of this dispute was the law of England, applying Article 4(3), in light of the conclusion that inevitably follows from the application of Article 4(2). I reject the suggestion as unreal the submission that a court cannot reach a summary determination on an issue such as this on an application of this sort. The test which a court is obliged to apply when considering a jurisdiction challenge of this sort is to ask whether there is a realistic prospect of, in this context, governing law being the law of England by reference to Article 4(3). For the reasons explained in the judgment, there is no realistic prospect of such an outcome.

23 That plays into the evaluative assessment of where the most convenient forum for determining this dispute is located. For the reasons explained in the judgment, and as Mr Zellick QC put it in his submissions on this point, the centre of gravity of this dispute is beyond question in the UAE. That is so because the governing law of the dispute is UAE law, but also for each and every one of the reasons which I summarised in the judgment in relation to that issue, which can be found set out, or summarised at any rate, at para.156 in a series of numbered sub-paragraphs.

24 The final point which is made is that I made an error in assessing the evidence concerning the location of documents. This is a dispute which arises because there is an insolvency process in relation to the PLC in England and an extensive insolvency process going on in relation to the operative subsidiaries in the UAE. The submission which Mr Beltrami makes is that I am wrong to reach the conclusion that there are no documents in England, because there are a very substantial corpus of documents held by the administrators in relation to PLC. If and to the extent I made an error in relation to that, it does not impact the overall assessment, because, all the relevant documents are likely to be in Abu Dhabi, for the reasons explained in the judgment but in summary because they are in the hands of the Abu Dhabi administrators. In any event, this is a relatively lightweight point when compared and contrasted with all the other points which are made in the judgment as to why the centre of gravity in this dispute is focused in the UAE. So I come to the conclusion that there is no realistic prospect of success, so far as an appeal is concerned, in relation to the issues identified and, therefore, to my conclusions concerning forum.

25 The final issue concerns whether or not permission to appeal should be given in relation to the conclusions I reached concerning full and frank disclosure and fair presentation. The claimant submits in relation to section 6 that the point is without merit because of my conclusion that reliance on s.6 was hopeless unless the law was extended, and the law could never be extended on an application of this sort, and in relation to the governing law point, that Bryan J when considering the application on a "without notice" basis was aware of it and that was sufficient. Neither of these points pass the permission to appeal test. The question in relation to the first of these points is not whether the point ultimately turns out

to be an unarguable one but whether it should be drawn to the attention of the judge determining the "without notice" application. I am entirely satisfied that this is a point that should have been drawn to the attention of the judge, albeit one which could, and perhaps should, have been identified as one which did not assist. That is what happens on an everyday basis on applications on a "without notice" basis in order to satisfy the without the full and frank disclosure obligation and the fair presentation obligation. So far as proper law is concerned, in the light of the conclusions I have reached, I do not accept that that was fairly presented to the judge and, in my judgment, could and should have been presented in a much clearer and comprehensive way than it was, and in those circumstances, I refuse permission to appeal in relation to those grounds as well. It should have been accepted that there was no real prospect of English law being the governing law. Had that been made clear, it would have been at least potentially material to the judge's assessment of the forum issue.

LATER

26 This is the defendants' application for costs. There are three different categories of costs in play, being: (a) the costs of the action generally; (b) the costs of the worldwide freezing order set aside applications; and (c) the costs of the jurisdiction challenges.

27 Although the claimant submitted that the defendants should recover only 20 per cent of all their costs, I consider this misplaced, and Mr Beltrami QC accepted that to be so, at least implicitly. To be clear, the defendants are entitled to their costs of the claim generally and of the worldwide freezing order set aside application without deduction. The true focus of attention should have been, and in the end was, on the costs of and occasioned by the jurisdiction challenge.

28 The applicable principles not in dispute. By CPR Part 44.2(2)

"(2) If the court decides to make an order about costs -

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order".

By CPR 44.2(4),

"In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including -

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful .....".

By CPR 44.2(6),

"(6) The orders which the court may make under this rule include an order that a party must pay -

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment .....

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead".

29 The defendants submit, and it is not in dispute as far as it goes, that Sir Alastair Norris accurately summarised at least some of the applicable principles in *Sharp v Blank* [2020] EWHC 1870 (Ch), [2020] Costs LR 835 at [7], where he stated that:

"(a) It is a commonplace that a successful party will not succeed on every aspect of its case. But notwithstanding that very frequent occurrence in litigation, the general rule still applies. Costs are determined by reference to overall success .....

(c) A degree of caution is needed against a too-ready departure from the general rule for the reasons explained by Jackson LJ in *Fox v Foundation Piling* .....

(d) There is no reason in principle why a party who succeeds in establishing one element of his cause of action but fails to establish the others should be regarded as partially successful .....

(g) It is, of course, not the law that a successful party can only be deprived of the costs of an issue if has unreasonably resisted that issue: any more than it is the law that he should be deprived of the costs of the issue simply because he lost it. In singling out an issue for separate treatment by way of costs I think the court must look for some objective ground (other than failure itself) which alongside failure distinguishes it from other issues and causes the general rule to be disapplied ... Without seeking in any way to be prescriptive, I think the distinctive ground may relate (amongst other things) to the comparative weakness of an argument (even if not unreasonably maintained) or to the necessity for particular evidence relevant only to that issue or to extensive and intensive legal argument directed to that issue which gives it an especial significance in the costs context."

30 Turning now to the jurisdiction application itself, the defendants submit that they should have all their costs, and the fourth defendant submits that, in any event, it should have all its costs, or a higher proportion of its costs than any other defendant, for the reasons identified in paras.7 to 8 of the judgment. Had Mr Zellick adopted the approach of conceding the real issue to be tried and gateway issues, but fought on forum alone, I could see merit in this approach, but that is not the approach that was adopted. Whilst he did not take up time on the other points, at any rate at the hearing, he did not need to, because they were fully argued by everyone else. Whilst Mr Zellick's focus was primarily on forum in his skeleton and oral submissions, he certainly did not abandon reliance on the other points. It cannot be

right that a defendant who adopts this approach can avoid a costs order being made by reference to points he explicitly, or implicitly, supports in this fashion.

31 Whilst I accept Sir Alastair's summary for what it is, it would be wrong to treat it as comprehensive, indeed I am sure it was not intended to be so. In particular, the approach set out by Jackson J (as he then was) in *Multiplex Construction v Cleveland Bridge* remains a key formulation in this area. As summarised in the current edition of the **White Book**, after reviewing the authorities, as they then stood, he extracted eight principles, including in particular,

> "1 That in many cases a judge can, and should, reflect the relative success of the parties on different issues by making a proportionate costs order.
>
> 2. That in assessing a proportionate costs order, the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs ...".

32 In my judgment, there is a plain distinction to be drawn in this area between issues as properly identified and arguments and sub-issues within issues, which is what Sir Alistair was referring to in paragraph (a) of his summary quoted above. The approach encapsulated in Sir Alastair's summary is particularly appropriate when considering submissions by reference to the section 1140 issue, or the section 6 issue. In the jurisdiction application there were, as always, three true issues, being those identified in para.14 of the judgment, by reference to Lord Collins' celebrated formulation in *Altimo Holdings and Investments Limited v Kyrgyz Mobile Telephones Limited* [2011] UKPC 7, [2012] 1 WLR 1804, at [71] and [78], namely, in summary:

1. As against each foreign defendant concerned, whether there was a serious issue to be tried on the merits applying the summary judgment test;
2. Whether a good arguable case, including a plausible evidential case, had been made out that the claim against each foreign defendant passed through at least one of the gateways identified in paragraph 3.1 of Practice Direction 6B; and
3. Whether in all the circumstances the *forum conveniens* for the determination of the litigation was clearly and distinctly England.

33 In my judgment, it is entirely appropriate in reaching a conclusion about costs to consider the success of the parties in relation to each of those issues. Where, as here, all three were fully in dispute. So far as that is concerned, the defendants lost on issues 1 and 2 but won on issue 3 and, therefore, in the result. I accept that the defendants avoided the error of not adopting the approach of Lord Hamblen in *Okpabi* set out in the judgment at para.21, but that of itself is not an answer to the point concerning costs orders reflecting relative success, in particular having regard to the terms of CPR 44.2(4)(b). I accept there is a distinction between losing an issue and unreasonable resistance on an issue. In the latter case the winning party who has unreasonably resisted will generally not only not recover its costs but will have to meet the opposing party's costs as well.

34 So to this case, I am entirely satisfied that the defendants have succeeded in the result and so in principle are entitled to recover at least some of the costs of the jurisdiction application. However, as I have said, that application depended on three true issues, two of which the

defendants lost. It is neither necessary nor desirable that I should descend into, or attempt to, analyse the issues further than that for costs purposes and, in particular to attempt to decide what parts of the evidence can be attributed to which true issues unless clearly and exclusively attributable to a true issue on which the defendants lost while succeeding in the ultimate outcome.

35 I am satisfied that in various ways, and for the reasons identified in the judgment, the resistance to the first two issues I identified a moment ago was at the weak end of the scale. Whether I dismiss the point as unarguable, or as one which is arguable but only at trial (and so in the result had the same effect), is not helpful or informative in relation to the costs issue unless used in support of a submission that an issue was unreasonably resisted but that is an argument the claimants have said they are not advancing. In my judgment, the appropriate solution is to direct that each of the defendants should recover one-third of their costs of the jurisdiction challenge.

36 Once parties to jurisdiction challenges appreciate the adverse costs consequences of not taking a realistic approach to the three true issues that arise the sooner these applications will take less time, consume less public resources and get disposed of more quickly. In the result, as I have said, the defendants will recover one-third of their respective costs of the jurisdiction application and their costs of the claim and of the worldwide freezing order set-aside application. Had they conceded the real issue to be tried and gateway issues, then it is likely they would have recovered a much higher proportion and possibly all their costs assessed due on the applicable (that is either the standard or indemnity) basis.

LATER

37 The issue I now have to determine is whether or not the costs that I have awarded to the defendants should be assessed either wholly or in part on the indemnity basis.

38 The principles that apply in this area are now very well established and are to be found in a series of well known and established authorities, but of which the most familiar is *Excelsior*. So far as that is concerned, in *Excelsior* the point was summarised as being a question which has to be tested by reference to whether or not the case, or some conduct within the case, by or on behalf of the paying party fell outside the norm or was, as it is rephrased in another authority in this area, unreasonable to a high degree.

39 The two issues on which the defendants focus are those that I address in paras.185 and 187 of the substantive judgment. Can I make clear at the outset that although it was submitted on behalf of the defendants that there should be an indemnity costs order because the failure fully and frankly to disclose and/or a failure to fairly present was either culpable or deliberate, I am satisfied that, whilst errors of judgment were made in this case, the non-disclosures to which I refer were neither culpable or deliberate.

40 Furthermore, in relation to the principal finding upon which the defendants focused (that in para.187 of my judgment), there seems to have been a failure fully to analyse what I said in the final two sentences of that paragraph. What I said is,

> "Had I come to the conclusion that forum should have been resolved in favour of England, I would, nonetheless, have made an adverse costs order by reference to that issue against ADCB. In all other respects I would have been satisfied that the presentation was full, frank and fair".

41 In might of my conclusion concerning deliberateness and culpability, I do not consider it necessary for me to impose an indemnity costs order, and I certainly do not conclude that it would be appropriate to impose an indemnity costs order in respect of the one-third of the costs that I have concluded the defendants should recover. Tta would be wholly disproportionate.

42 Two other points arise. First of all, Mr Zellick QC submitted at para.3.1 of his skeleton that there ought to be an indemnity order in respect of the issue on which the defendants succeeded because,

> "The court has held in the judgment at para.167 that ADCB's alleged linkage to England is an artifice constructed to support a jurisdictional challenge ...".

To be absolutely clear, that is not what I said in para.167 at all. What I had done in para.167 was to summarise the defendants' case and culminated in the final sentence of that paragraph in saying, "All this leads the defendants to submit, in the words of Mr Zellick QC, that ...", and then the reference to the alleged linkage in England being an artifice constructed to support a jurisdiction case. That language in the quotation in the judgment and in the written submission comes from Mr Zellick's own skeleton argument. It is not my language, but his, nor is it the conclusion that I reached.

43 Secondly, it was submitted by Mr Zellick that, by reference to what he calls the *Clutterbuck* principle, I should reach the conclusion that the costs that I have ordered the defendants should recover should be assessed on the indemnity basis. The *Clutterbuck* principle derives from the decision of David Richards J (as he then was) in *Clutterbuck v HSBC Plc* [2015] EWHC 3233 (Ch), [2016] Costs LR 13, and is concerned with what happens where an allegation of fraud or other dishonesty has been made and either fails or is withdrawn. That is a principle which is concerned with the substance of an allegation and not with a jurisdictional challenge, and particularly it is inappropriate to apply it in circumstances where I concluded that there is a reasonable issue to be litigated between the parties at the first stage of the jurisdictional challenge inquiry. In those circumstances, and for those short reasons, I conclude that the costs should be assessed on the standard, not the indemnity basis.

LATER

44 The fnalt issue I have to decide is how much the first defendant should recover in respect of its interim payment on account. The starting figure that I was supplied with was £553,000 odd. I am satisfied that the figure should be nearer to 50 per cent of that than 60 because of the imprecision in the way the figure has been calculated, or at any rate I should say presented. Doing the best I can with the material available, I direct that there should be a recovery, so far as the first defendant is concerned, of £300,000.

CERTIFICATE

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This transcript has been approved by the Judge.