Neutral Citation Number: [2024] EWHC 1011 (Comm)

Case No. CL-2020-000253

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 25/03/2024

Before:

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

IN THE MATTER OF

MORDCHAI GANZ (Claimant)

- v -

(1) PETRONZ FZE
(2) ABRAHAM GOREN (Defendants)

MR A GOOLD appeared on behalf of the Claimant
MR E LISTER appeared on behalf of the Second Defendant

APPROVED JUDGMENT

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DAME CLARE MOULDER DBE

1. Before handing down the judgment on this arbitration claim, I have to decide whether the judgment should be published. Mr Ganz's position is that he does not object to the judgment being handed down publicly and would wish for it to be published. Mr Goren's position is that he objects strongly to the judgment being handed down publicly. I have had the benefit of written and oral submissions from both parties' representatives.

Submissions

2. It was submitted for Mr Goren in summary that the fact that an alleged arbitration agreement has not been upheld does not disapply the LCIA rules governing the dispute resolution process. It was stressed for Mr Goren that the LCIA rules, Article 30, contain an undertaking to keep confidential all awards and material in the arbitration. It was submitted for Mr Goren that Mr Goren was brought into the process including confidentiality. The decision of the tribunal which was made under the LCIA rules was confidential and it cannot be right that, having confirmed the award following a re-hearing under Section 67, and a consideration of the Section 68 application the Court would undermine the integrity of Article 30 of the LCIA rules.

3. It was submitted for Mr Goren that the factors militating in favour of publicity have to be weighed against the desirability of preserving the confidentiality of the original arbitration and its subject matter. The test was set out by the Court of Appeal in *City of Moscow v Bankers Trust* [2004] EWCA Civ 314 where it was said that the courts, when called upon to exercise their supervisory role under the Arbitration Act

> "*are acting in the public interest to facilitate the fairness and wellbeing of the consensual method of dispute resolution ... and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate*."

4. In the *City of Moscow*, the Court of Appeal said they

> "*did not consider that a party inviting the Court to protect evidently confidential information about a dispute must necessarily prove positive detriment beyond the undermining of its expectation that the subject matter would be confidential*."

5. Mr Goren relied upon dicta of Males LJ in *CDE v NOP* [2021] EWCA Civ 1908 to keep confidential all awards in the arbitration together with all materials and documents. It was submitted for Mr Goren that the publication of the judgment is effectively the same as publication of the award.

6. It was submitted that the judgment covers sensitive and confidential matters for Mr Goren, whose reputation is very important to him and they would inevitably cause positive detriment. Mr Goren was brought into the arbitration and before the Court against his will. It was submitted that unlike the position in the case of *Manchester City v The Football Association Premier League* [2021] EWCA Civ 110, the judgment here contains everything about the underlying dispute.

7. It was submitted that in this case there is no public interest in the outcome, there are no important matters of public interest in the judgment that have not been dealt with

previously in other cases in the public domain and Mr Ganz has no good reason for seeking the judgment's or the award's publication.

8. It was submitted for Mr Goren that Mr Ganz has not been vindicated and has nothing to gain other than the undermining of Mr Goren, and reference was made to an affidavit in Cyprus which refers apparently to the arbitration award and contains allegations about Mr Goren.

9. It was submitted for Mr Goren that he is concerned that Mr Ganz will repeat matters which at the time were confidential under the arbitration and Mr Goren would not be able to do anything to stop Mr Ganz repeating those allegations. It was submitted that the procurement agreement was a side issue in these proceedings and ultimately the Court has found that it is Mr Goren who is correct about the SPA.

10. For Mr Ganz, it was submitted that the fact that the judgment arose out of an arbitration does not determine the outcome concerning publication. It is a fact-sensitive decision as is made clear by the *City of Moscow* judgment. It was submitted that the Court is not a mere extension of the arbitral process and that the LCIA rules no longer apply.

11. Reference was made to paragraph 41 of the judgment in *City of Moscow* that parties will not be deterred from arbitrating provided that the Court withholds publication in cases where there is real prejudice to the parties but publishes in other cases.

12. It was submitted for Mr Ganz that there was no valid arbitration agreement in this case and this therefore falls into the category of cases identified at paragraph 38 of the judgment in *City of Moscow* where it is difficult to see why the judgment should be kept private.

13. As to the public interest in arbitrations it was submitted that there are points of law and practice which are of general interest in this case, in particular the approach to a re-hearing.

14. It was submitted that Mr Ganz has a legitimate reason for seeking publication, which includes using the judgment in the winding up proceedings of GI3 in Cyprus and it was submitted that the judgment was relevant to the Court's determination in Cyprus. It was submitted that if the judgment is published its contents cannot be misrepresented by anyone.

Discussion

15. I accept on the authority of *City of Moscow* that the Court has to weigh:

> "*The factors militating in favour of publicity together with the desirability of preserving the confidentiality of the original arbitration and its subject matter.*" (*City of Moscow* at [40])

I also accept that a party inviting the Court to protect evidently confidential information about a dispute must not necessarily prove positive detriment beyond the undermining of its expectation that the subject matter would be confidential. (*City of Moscow* at [46]).

16. However, I also note that as stated by Mance LJ, as he then was, in *Bankers Trust*:

"*Whatever the starting point or actual position during a hearing it is not determinative of the correct approach to publication of the resulting judgment*." (at [37])

"*Further, even though the hearing may have been in private, the Court should when preparing and giving judgment bear in mind that any judgment should be given in public where this can be done without disclosing significant confidential information. The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under section 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity under the principles of Scott v Scott and article 6. Arbitration is an important feature of international commercial and financial life and there is legitimate interest in its operation and practice*." (at [39])

17. In this case, it was submitted for Mr Goren that the parties had an expectation of confidentiality in the arbitration and that Mr Goren was joined to the arbitration against his wishes. However, it seems to me that in the circumstances of this case, where the Court has found that there was no arbitration agreement and thus the tribunal has no jurisdiction, Mr Goren did not and cannot rely on the issue of publication of the judgment on the fact that he entered into an arbitration agreement with an expectation that in the event of a dispute the parties would resort to arbitration and that, in turn, would be confidential.

18. I accept that once Mr Goren was joined to the arbitration, he may well have had an expectation of privacy and confidentiality in the arbitration proceedings. However, I do not accept that the LCIA rules, in particular Article 30, prevent publication by the Court of its judgment. The supervisory jurisdiction of the Court is an entirely separate process and the decision by the Court whether to publish its judgment involves the consideration of the relevant factors in the circumstances of the case.

19. It was submitted for Mr Goren that the judgment covers sensitive and confidential matters for Mr Goren, but has not identified any specific confidential information over and above the general confidential nature of the underlying dispute.

20. In my view, the authority of *CDE* and the dicta relied upon by Mr Goren concerned the confidentiality of an award and different considerations apply. I accept that the judgment contains references to the award and submissions and evidence. I accept that this was a re-hearing of the issues put to the tribunal. However, that does not mean that all matters before the tribunal are referred to in the judgment. Only the essential elements of the factual circumstances of the underlying dispute which were necessary to the issues before the Court are referred to in the judgment.

21. Mr Goren sought to draw a distinction with my judgment in the *Manchester City* case at first instance in that in that case details of the merits judgment were not revealed. However, the disclosure of confidential information is not a bar to the publication of the Court's judgment. Rather, the confidentiality of any information in the judgment has to be weighed against the factors militating in favour of publication.

22. It was submitted for Mr Goren that publication of the judgment would disclose damaging material against the very party that has successfully defended the claim. It

was further submitted that Mr Goren would not be able to do anything about Mr Ganz repeating allegations even if the judgment did not go as far as the allegations made.

23. I am not persuaded that publication of the judgment would render other details of the arbitral proceedings public. Should Mr Ganz or any other person make unfounded allegations against Mr Goren which are not the subject of findings in the judgment then Mr Goren will have the usual recourse to the courts here or abroad.

24. I do not accept that the risk of references to matters which are not in the judgment is a factor which militates against publication of the Judgment.

25. As to Mr Goren's submission concerning the publication of other damaging material, this is a reference to the procurement agreement and the issue of Mr Goren's reputation. I do not doubt that the Court's findings on the issue of Mr Goren's credibility and the reasons for that finding are sensitive from Mr Goren's perspective. It was submitted for Mr Goren that the procurement agreement is a side issue in these proceedings and ultimately it is Mr Goren who was correct about the SPA.

26. I accept that Mr Goren has succeeded in his defence of the claim and Mr Ganz has failed to show that the SPA was authentic and binding. However, it is not the case that where a defendant successfully resists a claim it inevitably means that it should not be published. The significance of the procurement agreement is set out in the judgment and went to the issue of Mr Goren's credibility. Mr Goren's reputation may be damaged by his actions in relation to the procurement agreement and the Court's findings in this regard at paragraph [82] of the Judgment, but they were his actions and that is not, in my view, a good reason in favour of withholding publication of the judgment.

27. As referred to above, the expectation of confidentiality in arbitral proceedings is limited in this case and has to be weighed against the other factors.

28. Thus, the Court balances the matters raised by Mr Goren in opposition to publication of the judgment against the public interest in the publication of judgments. I do not accept the submission from Mr Goren on the authorities that publication is desirable only where it can be done without disclosing confidential information. Any confidential information which falls to be disclosed as a consequence of publication has to be considered and weighed against the public interest factors.

29. It was submitted to Mr Goren that there is no public interest in the outcome of this case. However, the authorities are clear that there is the legitimate interest in the operation and practice of arbitration. This is over and above the specific issues raised by this case including the approach to a re-hearing, the use of the summary procedure in the Commercial Court guide and the issue of expert evidence in the context of case management.

30. Further, in my view, the issue is not whether Mr Ganz has a good reason for seeking the judgment's publication. There is a much broader issue of public interest, which is the desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent.

31. The Court has to balance the competing factors. In my view, in the circumstances of this case, the factors in favour of publication outweigh the contrary considerations for the reasons discussed above.

(There followed proceedings)

32. I now formally hand down my judgment in this case. For the reasons set out in the judgment I find that the arbitration agreement is not valid and binding and the tribunal has no substantive jurisdiction.

33. In relation to the second ground of challenge, based on section 33 of the Act, that challenge is dismissed for the reasons set out.

(There followed proceedings)

34. I turn then to deal with the issue of costs. There are three matters which are raised. The first is the application for summary judgment, the second is the costs of the arbitration claim in its entirety, and the third is the costs of today and the associated costs insofar as they relate to the issue of publication of the judgment.

35. Under CPR 44.2, the Court has a discretion as to whether costs are payable by one party to another. If the Court decides to make an order the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the Court may make a different order, and in deciding what order to make, the Court has regard to all the circumstances including the matters identified in the rules.

36. In relation to the application to strike out the claim, Mr Ganz submitted that Mr Goren was unsuccessful in that application and sought an order that Mr Goren paid Mr Ganz's costs of that application, such that those costs should be set off against any costs Mr Ganz may be liable to pay to Mr Goren in relation to the rest of the arbitration claim.

37. In my view, the application to strike out was, in reality, largely subsumed within the arbitration claim. Foxton J determined that there was no purpose in dealing with it on the papers when the hearing of the claim was imminent.

38. In his submissions for this hearing it was submitted for Mr Goren that the application was not actively pursued at the hearing. However, as recorded in the judgment, there were submissions by Mr Lister, albeit I accept fairly limited, to the effect that the Court should approach the claim on a summary basis and these submissions were addressed and rejected in the judgment.

39. I accept that the time devoted to that issue was very small overall, and I also accept that it did not significantly impact the length of the hearing or the work for the hearing. In all the circumstances, I am not persuaded that the appropriate order is that Mr Goren should pay Mr Ganz's costs. The fact that the application was in effect subsumed within the arbitration claim and the hearing of that claim means that, in my view, it should not be treated as a separate application.

40. Mr Goren was successful in his defence of the arbitration claim and as such applying the general rule is entitled to his costs. However, CPR 44.2(4) and (5) provide that the Court is required to take account of all the circumstances, including issues on which he is unsuccessful. In my view, Mr Goren was not successful on the issue of summary

judgment, to the extent that it was pursued, and this should be reflected in the costs order.

41. In line with CPR 44.2(6) and (7), I propose to make a proportionate order to reflect this. However, before deciding on the appropriate percentage I have to deal with the submission concerning the settlement discussions.

42. I have before me correspondence which was sent by Mr Goren to Mr Ganz suggesting a way forward. It was submitted for Mr Ganz that Mr Goren did not engage in the settlement discussions in the sense that he did not respond to the questions that were raised by his solicitors as to the detail of the settlement which was proposed and as a result it was submitted that his conduct should mean that he should only get a proportion of his costs overall.

43. In response, it was submitted for Mr Goren that it was Mr Goren who made the initial approach for a settlement, that there were attempts on behalf of Mr Goren, numerous attempts, to pursue the proposed settlement negotiations, that these were not productive and it was submitted that Mr Goren should not be denied his costs when he was seeking to resolve the proceedings separately and by another route.

44. It has become very evident to me during the course of these proceedings that the personal animosity between the parties has led to very entrenched positions being adopted on both sides. It was unfortunate that this matter was not apparently capable of being resolved prior to the hearing. However, in the circumstances, I am not prepared to apportion blame to either side and it cannot be said that the fault lies solely with Mr Goren such that in my view he should be penalised in the costs order that is made.

45. I therefore propose in relation to the costs of the arbitration, leaving aside the issue of publication which I will deal with separately, that the appropriate proportionate order is that Mr Ganz should pay 90 per cent of Mr Goren's costs.

46. In relation to the hearing today, it was submitted for Mr Ganz that the issue has taken a large proportion of the hearing, approximately one and a half hours, and involved significant preparation. It was therefore submitted for Mr Ganz that Mr Goren should pay a proportion of Mr Ganz's costs of this hearing.

47. Mr Goren submitted that he should not be penalised in costs in relation to the issue of publication, that the question was properly raised and properly pursued, and it should be costs in the case.

48. Whilst the issue of publication is one which often arises on an arbitration claim, it seems to me that this was in effect a separate application by Mr Goren opposing publication. In the circumstances, it seems to me that Mr Goren should pay Mr Ganz's costs of the application for publication, to be assessed on the standard basis if not agreed.

49. As far as the costs of today are concerned, it seems to me that approximately 70 per cent of the hearing was devoted to that issue.

50. Finally, in relation to the question of a payment on account, CPR 44.2(8) provides that the Court will order a reasonable sum on account of costs unless there is good reason not to do so.

51. It seems to me that there is no good reason not to order that Mr Ganz make a payment on account. The authorities are clear that the Court has to make an estimate of what is likely to be recovered on a detailed assessment, but it can be no more than a very rough estimate in circumstances where a detailed assessment has yet to take place. The Court will therefore take a cautious approach. The Court will also, in this case, take account of the fact that there will be an order that Mr Goren pays the costs of the publication issue and that is factored into the payment on account which I now order.

52. The amount which is to be paid on account is the sum of 55 per cent of the costs which are set out in the statement of costs which is before the Court. I do not propose formally to make a cross order in terms of a payment on account in favour of Mr Ganz, but it is reflected in the figure of 55 per cent.

(There followed proceedings)

53. So what I am proposing is that out of the costs of the arbitration claim you will strip out the costs of the publication "application". As far as the costs of the arbitration claim, including the summary judgment application, excluding the publication issue is concerned, Mr Goren is entitled to 90 per cent of his costs to be determined by detailed assessment.

54. As far as the publication issue is concerned, Mr Ganz is entitled to his costs, those will be a matter for detailed assessment. However, by way of guidance, in relation to the time spent at the hearing, I have indicated that it is 70 per cent, but I am not saying that he is getting 70 per cent. He is getting his costs of the publication issue and when those are calculated, put to detailed assessment, they will comprise, no doubt, the skeletons and the hearing time, and what I was saying was that by way of guidance I think the hearing time has been roughly 70 per cent.

This transcript has been approved by the Judge