



Neutral Citation Number: [2021] EWHC 2083 (Ch)

Claim Nos: FL-2020-000047 / FL-2020-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

The Rolls Building
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Fetter lane
London EC4A 1NL

Date: 22/07/2021

Before:
MR. JUSTICE MILES

Between:

THE ECU GROUP PLC

Claimant/
Respondent

- and -

DEUTSCHE BANK AG

Defendant/
Applicant

And Between:

THE ECU GROUP PLC

Claimant/
Respondent

- and -

GOLDMAN SACHS INTERNATIONAL

Defendant/
Applicant

MR. FARHAZ KHAN (instructed by **Cooke, Young & Keidan LLP**) for the
Claimant/Respondent.

MS. LAURA JOHN QC (instructed by **King & Spalding International LLP**) for the
Defendant/Applicant Deutsche Bank.

MR. SIMON ATRILL (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the
Defendant/Applicant Goldman Sachs.

Approved Judgment

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MR. JUSTICE MILES :

1. These are two sets of proceedings in which ECU Group plc is the claimant: one is against Goldman Sachs International and the other is against Deutsche Bank. In each, ECU alleges breaches of duty in relation to certain forex transactions. At the moment the scale of the claims is unclear. The claim forms refer to sample transactions and it is not clear whether ECU might intend, at some stage, to try to bring in other transactions.
2. Both defendants sought security under CPR 25.13(2)(c) on the basis that the claimant is a company and there is reason to believe that it will not be able to meet an order for costs in favour of the defendants if ordered to do so. There is no disagreement as to the principle of security or the amount or the form in which security should be given. The only issue before me has been as to timing. The defendants both say that security should be ordered to be provided within 14 days from today; the claimant says that it wants until 26th August, that is to say 35 days from today. That is the narrow dispute that I have to resolve.
3. By way of background and dealing first with the Goldman Sachs case, the claim form was issued in November 2020. The defendant's solicitors raised the issue of security for costs on 27th November 2020. The claimant's solicitors agreed in principle that security would be provided on 26th March 2021. On 7th May 2021, the claimant agreed to the amount of security in the sum of £500,000 and agreed to provide details of the mechanics. There was no agreement as to the mechanics, and they had still not done so by the time the application was issued, which was in early June. There was evidence from Mr. Elam, a solicitor acting for the claimant, and Mr. Norris-Jones, GSI's solicitor. On the eve of this hearing, 21st July, the claimant's solicitors sent a letter, which I shall come back to.
4. Turning to the chronology in the claim against Deutsche Bank. Again, the proceedings were commenced in November 2020. Security was first sought by the defendant in February 2021, in a letter which also set out the grounds for saying that the claimant would or might be unable to pay. The claimant agreed in principle to provide security at the end of April 2021. There was a debate about the amount. The defendant sought £500,000 down to the first CMC. On 7th June 2021 the claimant agreed to that amount and said that £500,000 would be provided as soon as possible. Then, on 14th June 2021, the claimant said it could not commit to any given date for the provision of the security and referred to "wider contractual arrangements" affecting the relevant funds but did so in general terms. On 18th June 2021 the defendant issued the application seeking payment of the security within 14 days of the court's order.
5. 14 days from now would mean, in the case of Deutsche Bank, about eight weeks from the date it was agreed that the security would be paid. (In the case of the Goldman Sachs's claim, it is still longer, since there was agreement in early May that security would be provided in the amount sought.)
6. Again, there is a witness statement from Mr. Elam, and a witness statement from Ms. Walker, a solicitor for the defendant.

7. There was also a letter sent yesterday relating to this claim too, in which the claimant's solicitors purported to give further information about the current position, and the reasons why more time was being sought. It is important to bear in mind that the letter is not evidence. It is of course not accompanied by a statement of truth. This is not satisfactory, in that on applications of this kind the court has to act on evidence. There was no explanation why this material was not put in a further witness statement.
8. It is common ground between the parties that where the court orders security, it should give a reasonable time for payment. Reference was made to Appendix 10 to the Commercial Court Guide, paragraph 6, which refers to the general rule that security should be ordered to be provided within a reasonable time. The parties also referred me to CPR 40.11, which sets a general rule, unless the court orders otherwise, that an order or judgment for the payment of money must be met within 14 days.
9. The parties have urged a number of factors on the court when deciding what time should be required for payment. I will deal with these under a number of headings.
10. First, in my judgment it was always likely in this case that the claimant would have to provide security. It had brought existing proceedings against HSBC. The trial has not been completed but the evidence at that trial has been given. It is a substantial and heavy piece of litigation. ECU had to provide security for costs in those proceedings, and it was always probable that security would have to be provided in these proceedings too. So the claimant should at least have anticipated, at the time when it started these proceedings, that it would have to provide security for the costs of these defendants.
11. Second, a good deal of time has elapsed since the defendants first sought security. I have already referred to the chronology.
12. Third, a good deal of time has also elapsed since the claimant agreed to provide security. In the case of Goldman Sachs, it agreed in early May. In the case of Deutsche Bank, it agreed in early June, saying that it would provide security as soon as possible. In heavy litigation of this kind, that kind of assurance should be taken seriously, and should be taken to mean what it says.
13. The fourth feature is that some time has elapsed too since the applications were issued. In the case of Goldman Sachs, that was on 3rd June 2021. In the case of Deutsche Bank, it was 18th June 2021. That is more than a month in each case. The defendants cannot be held responsible for the time it has taken for the applications to come on.
14. The fifth feature is the quality of the explanation for security not having been provided so far, and for the time sought by the claimant until 26th August. Starting with the evidence of Mr. Elam, I consider it is woolly. It is not even clear, from that evidence, whether funds would be available by the end of August. He refers to arrangements with third parties, but those arrangements are not further specified, nor are the third parties even identified. There is no explanation of the steps that have been taken down to the date of his evidence to seek to agree terms with any relevant third parties. Mr. Elam suggested that the claimant would start around the time of his statement, that is to say 7th July 2021, to take parallel steps, but no evidence is given of the nature of those steps. There is an absence of evidence as to when ECU started to take serious steps to seek to release funds which are apparently held in an account for the purpose of giving security.

15. There is a suggestion in the evidence that at least some of the officers or employees of ECU have been preoccupied with the HSBC litigation but, again, the evidence is vague. There is no explanation as to whether ECU has put in place any internal arrangements, for example, to delegate the question of the issues about security to one or more of its officers, or to create a subcommittee for the purpose of doing so. There is no evidence of a satisfactory nature to explain why some, at least, of those officers should not have been getting on and dealing with the question of providing security which had been promised. Where proceedings of this kind are brought in the Financial List, they are to be taken seriously, and claimants which bring proceedings are expected to put in place adequate arrangements to be able to provide proper instructions and make such arrangements as are necessary to progress the litigation.
16. The sixth feature is the possibility or prospect of prejudice to the defendant depending on the date at which security is ordered to be given. Both defendants have a deadline for providing their defences at the end of August, one day before the date that the claimant is seeking. Both defendants will therefore be undertaking work in that period. The purpose of security is (to state the obvious) to provide protection in respect costs spent by the relevant party and if those costs are being incurred without the protection of security there is obvious prejudice.
17. The seventh feature is the possible prejudice to the claimant. I bear in mind that the defendants are not seeking an order with an automatic sanction for the strike out or the stay of proceedings. What they are seeking is an order which provides discipline and requires ECU to get on and provide security. It seems to me that there is much to be said for the imposition of such discipline.
18. I also take into account eighth the evidence which has not been answered, that at the moment the claimant is in a parlous financial position. I say that on the basis of the evidence about an answer that was given in the course of the HSBC proceedings.
19. The claimant makes a number of further points in support of its proposed date of 26th August 2021. First, it says that its officers have been heavily involved in the HSBC proceedings. It was said by counsel to be an all-consuming affair. As to that, I have already said that there is no satisfactory evidence before the court, as opposed to submission, in relation to this. Nothing has been said in the evidence to support the idea that all of the officers and employees of ECU have been fully employed 24/7 in the HSBC proceedings (as was at least suggested by counsel's submission). The letter that was written yesterday does not suggest that either: it says that the officers will have more time now to devote to these proceedings but does not suggest that they had no time previously. I have also already explained that, in cases of this kind, it is incumbent on parties to make proper provision for giving instructions and dealing with third parties where that is necessary.
20. The claimant then relies on the letters that were written yesterday, which I have already mentioned. As I have said, these are not evidence. But even on their face, they too are vague and unclear. They refer to arrangements with third parties without spelling out the nature of those arrangements. They do not explain what steps have been taken to date to seek to obtain any necessary consents for the release of the moneys. They speak in general terms of the prospect of seeking to organise further ATE insurance, apparently as a way of procuring the release of some of the moneys. But the letters are very short on detail about this too. Nor do the letters say in terms that it would not be

possible for ECU to meet a 14 day deadline. Counsel for ECU that it was inevitable that ECU would not be able to meet that deadline, but I do not read the letters as saying that. What the letters appear to me to say is that ECU would prefer to have further time, but they do not say that it would be impossible for ECU, if ordered by the court, to provide the security within 14 days. ECU promised to give security some months ago and in my judgment it was incumbent on to come forward with proper and clear evidence if they now wished to have a yet further five weeks to provide security. It has not done so.

21. I have considered all these factors. In all the circumstances, I consider that the appropriate order is that ECU should provide security within 14 days of today.
22. The defendants ask for their costs on the indemnity basis. They say the case is outside the norm. They say that the claimant should have provided the security some time ago, that they were forced to make the application and that the evidence filed by the claimant was unsatisfactory. In my main judgment I described it as woolly or vague. They also say that the claimant should have anticipated the need for security and should have put in place proper arrangements in order to be able to meet the claim for security. The claimant says that I should not order costs on the indemnity basis. It says it was entitled to seek a longer time. It accepts that it has lost and should bear the costs but says that the arguments and points taken were not outside the norm for litigation of this kind.
23. I have decided not to order costs on the indemnity basis. There is some force in the points made by the defendants, but, in the end, I consider that this is part of ordinary commercial litigation where parties take positions on which they may win or lose. The claimant on this occasion has lost. It wanted more time and has not managed to obtain it. However, in my view, an order for costs on the standard basis meets the justice of the case.
24. Both defendants seek summary assessment of their costs.
25. GSI's total schedule of costs comes to £27,000. The claimant essentially takes two points. First, that the headline rates for City solicitors for grade A solicitors in the recent publication of the Civil Justice Council is £512. They point out the rates of grade A fee earner in this case are rather higher at £571-577. As to that point, the defendant points out that the rates charged on this bill are about 35% lower than the recommended headline rate of £270 for a grade C fee earner. The defendant also points out that the guidance itself makes clear that it is only guidance, that the rates to be charged by fee earners vary according to all the circumstances, including the scale and complexity of the case, and that this is a complex and an important case, in which serious allegations are made. I am satisfied that the rates charged in the case of Goldman Sachs are appropriate. The other point which is taken on the schedule is that there was an application for an extension of time for the service of evidence by the claimant. That led to an application by letter to Snowden J, who granted an extension of time. The costs in relation to that amount to about £2,800. Snowden J did not make any order in respect of costs. The order he made was to grant an extension of time to the claimant for the service of its evidence but made it clear that that should be regarded as a final extension. To my mind, that part of the costs should simply be seen as costs in the application and should be dealt with as part of the overall costs. Looking at matters in the round it seems to me that the level of costs is perhaps marginally on the high side

for a short application of this kind, but only marginally, and I will order a summary assessment of these costs of £25,000.

26. In relation to the claim against Deutsche Bank, the only point which is taken is the hourly rate point. The amounts charged by the fee earners on this case are somewhat higher than in the other case, with the band A earners being at £716 and £701 respectively. There is also a band B earner at £434, but the only criticism was made in relation to band A. I make the same points as I did before, that the guidelines are only that. The appropriate rate depends on the size of the case and its complexity. It is suggested that the difference between the rates charged and the £512 an hour in the guidelines was around £2,700 or £2,800. Again, looking at things in the round, I think that the appropriate order would be to order a summary assessment of £25,000.
