



Neutral Citation Number: [2020] EWHC 2161 (Comm)

Case Nos: CL-2018-000297; C-2018-000404; CL-2018-000590; CL-2019-000487

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 6 August 2020

**Before :**

**MR JUSTICE FOXTON**

**Between :**

**SKATTEFORVALTNINGEN**  
**(the Danish Customs and Tax Administration)**

**Claimant**

**- and -**

**SOLO CAPITAL PARTNERS LLP**  
**(in special administration) and others**

**Defendant**

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**James Ruddell** (instructed by **Pinsent Mason LLP**) for the **Claimants**  
**Nigel Jones QC, Lisa Freeman and Laurence Page** (instructed by **Meaby & Co Solicitors**  
**LLP**) for the **Sanjay Shah Defendants**

Hearing date: 31 July 2020  
Draft judgment to the parties: 3 August 2020

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**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 6 August 2020 at 10.00am.**

Approved Judgment**Mr Justice Foxton :****Introduction**

1. This is the application of the Sanjay Shah Defendants for an order that a substantial sum currently held in court should be paid out for the purposes of enabling them to pay their legal fees to the end of this litigation.
2. The sums in court are monies in which both SKAT and the Sanjay Shah Defendants claim a proprietary interest. It is common ground that both proprietary claims are arguable in the sense that they are not susceptible to summary judgment in either direction, but will have to be determined at trial.
3. I have set out the background to the application in a previous judgment which is reported at [2020] EWHC 1658 (Comm).
4. The issues raised by this application are difficult ones, but not unfamiliar:
  - i) SKAT claims it has been the victim of a huge fraud perpetrated by the Sanjay Shah Defendants, among others, and wishes to maximise its prospects of recovering the proceeds of that fraud. It is therefore reluctant to allow monies in which it claims a proprietary interest to be spent on the Defendants' legal expenses.
  - ii) The Sanjay Shah Defendants deny the allegations of fraud, but say that their ability to defend those allegations and vindicate themselves is being severely impaired by steps taken to seize what they say is their property, both in this action and in criminal and regulatory investigations outside it, and that if they are prevented from using property to which SKAT has only an arguable proprietary claim, their ability to defend themselves will be severely compromised.
  - iii) The Court cannot decide at this stage whether SKAT are right that they were defrauded by the Sanjay Shah Defendants, or whether the Sanjay Shah Defendants are right and SKAT's claims are without merit.
5. The principles which the Court applies in these circumstances are those set out in Marino v FM Capital Partners Ltd [2016] EWCA Civ 130 and Kea Investments Ltd v Watson [2020] EWHC 472 (Ch).
6. In such circumstances, the first thing which the Court will seek to ascertain is whether there are other assets in which the claimant does not assert an interest which the defendant can use to meet its legal fees, a matter on which the party seeking to use the identified funds bears the burden of proof. If that burden is met, the court must then ask whether the apparent injustice of allowing the defendant to use the funds is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may in due course be a successful defence.
7. In this case it is common ground that the Sanjay Shah Defendants have very substantial assets to which SKAT does not assert a proprietary claim and which are not subject to a proprietary or similar injunction. I am going to refer to these as the Unclaimed Assets. I understand that Mr Shah has valued the Unclaimed Assets at a

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figure significantly in excess of the amount which the Sanjay Shah Defendants seek to withdraw from court, although of course it is less clear what the realisable value of these assets might be, particularly in these turbulent times. However, as matters stand, the Unclaimed Assets are subject to criminal restraints which prevent their use, or they are illiquid assets, with it being unclear precisely when, or for what amounts, the assets can in due course be realised.

8. It is, accordingly, common ground that, as matters stand, the Sanjay Shah Defendants have access to no other assets than the funds in court to meet their legal liabilities. There are, however, Unclaimed Assets which are not subject to legal restraint which may be liquidated over the next 18 months:
  - i) There is what is described as a “box option” investment due to be redeemed on 11 January 2021.
  - ii) There is a loan due to be repaid in June 2021, with a related right to shares.
  - iii) There is a larger loan due to be repaid in December 2021.
9. The value of the loan covenants is presently uncertain. By contrast, the funds in court are liquid cash of fixed value. The Sanjay Shah Defendants have offered undertakings with a view to providing SKAT with a charge over or otherwise securing the Unclaimed Assets to replace the proprietary interest claimed over the sums currently in court. I return to this issue below.

**The structure of the proceedings**

10. The SKAT litigation, for which Mr Justice Andrew Baker is the designated judge, is one of the largest and most complex pieces of litigation to be heard in the Commercial Court. At a CMC in July 2020, Mr Justice Andrew Baker gave directions for the trial of the action as follows:
  - i) There will be a one week trial, referred to as the Revenue Rule Trial, which has been fixed for 22 March 2021. This will consider the argument advanced by all of the Defendants that SKAT’s claims must fail because they involve an attempt by a foreign state to recover tax or revenue.
  - ii) If the action progresses beyond the Revenue Rule Trial, there will be a 6-week “Validity Trial” fixed for 25 October 2021, which will be “definitional”, and significantly shape the future of the litigation, but will not be legally dispositive, however decided.
  - iii) There will be a Main Trial commencing in Hilary Term 2023 and concluding by Easter 2024.

**The Sanjay Shah Defendants’ costs arrangements**

11. The Sanjay Shah Defendants have retained their legal team on a “whole case fee” basis under which it has been agreed that an agreed total discounted base fee will be paid for representation for the entire trial. That amount became due immediately on the signing of a Conditional Fee Agreement (“the CFA”). The CFA contains two termination dates for the members of the legal team. There is a right of termination if

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about 35% of the total is not paid by 1 October 2020, and a further right of termination if the balance is not paid by 1 March 2021. The CFA does not cover disbursements (other than counsels' fees), for which the Sanjay Shah Defendants seek a further payment on this application, although Mr Jones QC made it clear that in his opinion the amount sought was unlikely to be enough.

12. The Sanjay Shah Defendants say that the amounts payable under the CFA fall very substantially below the reasonable value of the work which will be necessary to complete the Main Trial. Given the gargantuan scale of this litigation, and the amounts which I am told SKAT has estimated it will have to spend, that may very well be right. However, there remains the possibility that the litigation may not run its full course, or a particular legal representative may not for any reason run the full course of the litigation. For example, a member of the legal team who was paid their part of the first instalment but not the second would be able to terminate the retainer, but keep the first instalment regardless of its connection to the reasonable value of work done up to that point.
13. One consequence of the fee arrangement is that to the extent that the Court orders payment of the full amount sought now, it will be immediately extinguished by paying legal fees for the entire litigation, even though this exceeds the reasonable value of the work done to date or to be done in the next few months.
14. Mr Jones QC informed the Court that if the £5m figure was not paid when due under the CFA, then the legal team would be exercising their right to terminate the CFA.

### **The parties' positions in summary**

15. Against that difficult background, the parties' positions are as follows.
16. SKAT submits that the Court should not release the full amount sought now, but a smaller sum. It proposes that the amount released should reflect the work done to date, save to the extent it is already secured by a charge, and estimated work over the next three months, albeit the advance should be on terms which seek to secure SKAT so far as possible.
17. SKAT submits that this proposal will allow for the possibility of further developments in the position of the Unclaimed Assets, which might, for example, be freed from existing restraints or realised. It would also allow for developments in SKAT's tracing claim which it is said is the subject of ongoing investigation. And it would avoid the risk of a substantial sum being spent now by way of a whole trial fee with the risk that parts of the payment might exceed the reasonable value of the services provided.
18. The Sanjay Shah Defendants submit that as a matter of efficient use of court resources and in fairness to them, the Court should deal with the entirety of their legal costs on a "once and for all" basis now, rather than proceed on a staged basis. In this regard, they referred me to Mr Justice Bryan's observation in SKAT [2020] EWHC 377 (Comm) at [32] that:

"It would be somewhat myopic to take no regard of the fact that, in applications such as the present, it takes some time to get on and to marshal the associated facts and have the application determined by the court, and that funds are being

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consumed on an ongoing basis. Further, I consider that regard should be had to the future, at least so far as it can be mapped out with any degree of certainty. This is because it is appropriate to make sure that the parties know where they stand going forward in the immediate future: this ensures that there are funds available for Mr. Barac's living expenses to support his wife and family, and to have regard to what legal costs have been incurred and will be incurred in any relevant timeframe. Put another way, matters should be considered by the court before the defendant is unable to feed his family and has lost his legal representation”.

19. They submit that, following the July CMC at which Mr Justice Andrew Baker made the significant case management orders I have referred to, the shape of the litigation going forward is clear. They also submit that the benefit of their approach is that the Sanjay Shah Defendants can then be held to the amount agreed in the CFA, which they submit represents a very substantial on the costs of the litigation on a conventional basis. They say that their approach, which commits the Sanjay Shay Defendants to what is a heavily discounted budget in advance, will avoid the issue highlighted by the-then Martin Griffiths QC sitting as a deputy in Ford v Williams [2018] EWHC 3172 at [37]:

“Given that this is a dispute about assets which are being used in part to fund the litigation, it is important that the defendant should not be able to run down those assets by incurring legal expenses without limit. The court has already set a budget for the defendant which is much less than he wanted to spend. He is bound by that decision and he must cut his coat, in terms of the legal advice and representation that he obtains, according to his cloth”.

20. They say that if the order they seek is not granted, then it will not be possible for the Sanjay Shah Defendants to meet the payment deadlines under the CFA, with the result that the legal team will not be bound by the agreement, and will be free to charge on an alternative basis which will involve a very significant increase in fees.
21. Finally, they submit that:
- i) as an emanation of the Danish state, it is unfair for SKAT to resist the use of the Net Proceeds to meet the Sanjay Shah Defendants’ legal fees, when it is other emanations of the Danish state who have imposed the restrictions which make it impossible to use the majority of the Unclaimed Assets, and
  - ii) they rely on the fact that SKAT encouraged them to use the monies now paid into court to meet their legal fees, before performing a *volte face*.

**Analysis and conclusion**

22. I am satisfied that the appropriate course in this case is to order a payment out of court now of a sum sufficient to cover:
- i) the outstanding fees as at 25 June 2019;
  - ii) the Sanjay Shah Defendants’ costs of the hearings of 19 June and 31 July 2020;

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- iii) the estimated legal costs to be incurred by the legal representatives of the Sanjay Shah Defendants who are subject to the CFA, calculated on a conventional charging basis for the period to 31 January 2021; and
  - iv) the further sum payment sought by the Sanjay Shah Defendants for disbursements, on condition that (a) the amount is held separately by Meaby & Co which it would hold subject to SKAT's proprietary claim until used, and (b) it is only to be used for the purposes of meeting legitimate disbursements in the litigation as and when they fall due for payment (which would not include sums covered by the CFA).
23. I have reached this conclusion for the following reasons.
24. I am satisfied that it would not be appropriate at this stage to order a full payment out which would cover the entire amount due under the CFA. This would have the effect of immediately consuming that amount, regardless of the reasonable value of the work done to date. The approach I have adopted reduces the risk of funds to which SKAT asserts a proprietary claim being consumed by payments of legal fees exceeding those reasonably incurred to date. As Bryan J noted in Skattforvaltningen v Barac at [35]:
- “The court is concerned to ensure that the proposed expenditure is at least necessary for the proper purposes of the defence. The claimant is not entitled to monitor each of the steps the defendant proposes to take in litigation but it would be wrong, for example, for certain expenditures to be made prematurely or where there is a real danger that it will be thrown away. This is because part of the exercise of a discretion involves taking into account the risks of injustice to a claimant in having his own money used to litigate against him so the court will act more cautiously to minimise the wastage of funds.”
25. Further, the box option investment is due to mature on 11 January 2021, which represents a potential source of Unclaimed Assets which could be used to meet the Sanjay Shah Defendants expenses. On any further application, the Court will be able to have regard to developments in relation to that asset, and indeed any further developments, for example variations in restraint orders or in SKAT's tracing analysis.
26. The possibility of future developments so far as the Unclaimed Assets are concerned is not, in my opinion, sufficiently catered for by the offer from the Sanjay Shah Defendants of an undertaking which would replicate the claims to the funds in court once it is possible to do so. As matters stand, it is not possible for the Sanjay Shah Defendants to grant SKAT a proprietary interest over properties which are the subject of criminal restraint orders. An undertaking by Mr Shah to grant an equivalent proprietary interest once he is able to do so would replace what is currently a proprietary claim against the amounts in court with a personal claim against Mr Shah. Further, any attempt by SKAT to enforce that undertaking, whether as a monetary judgment (akin to an undertaking as to damages) or pursuant to the court's committal jurisdiction faces the difficulty that Mr Shah is resident in Dubai where English judgments are not enforceable. In addition, issues may arise as to the liquidity or realisable value of other assets, or the existence of rival claims to them including, possibly, claims by SKAT itself depending on what the ongoing tracing work reveals.

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Finally, any proprietary interest which is subsequently created in SKAT's favour will necessarily be less beneficial than any claim SKAT has to the monies in court, because it will have been created later in time.

27. I accept that the 6-month period will involve the need for a further application by the Sanjay Shah Defendants, which will be something of a distraction from work on the case. However, I would note that the Sanjay Shah Defendants' own position offers scope for satellite disputes in the context of the undertakings being offered. A further application in 6-months' time will be considerably less intrusive than the 3-month review sought by SKAT. It is a period of time sufficient to allow a realistic possibility of further developments, and will allow the Court to compare the Sanjay Shah Defendants' estimates of costs for the next 6 months with the level of conventionally-assessed costs actually incurred. It will require a further hearing in the latter part of January 2021 when there is no significant hearing in the litigation (it falls between the CMC before Mr Justice Andrew Baker on 14 December 2020 and the Revenue Rule Trial before him starting on 22 March 2021), and it will take place in a term in which I will be sitting in the Commercial Court. I should make it clear that I would expect the scope of a January hearing to be very narrow, with further evidence being filed only to address any new information which has come to light on the Sanjay Shah Defendants' assets and an update of the costs incurred and to be incurred. It is not intended to be an occasion at which, absent a material change in circumstances, the "in principle" approach adopted at this hearing will be revisited. In this respect, the course I am proposing is similar to the "staged approach" to security for costs frequently adopted in the Commercial Court.
28. I do not know what effect this order will have on the willingness of the Sanjay Shah Defendants' legal team to continue working under the existing terms of the CFA. However, that of itself is not a matter which leads me to conclude that the balance of the interests I have sought to strike is an unfair one. The terms of the CFA are an unconventional mechanism to funding High Court litigation. Mr Jones QC made it clear that when the CFA was agreed, those involved were alive to the fact that it was likely to be necessary to make applications to the court to use assets over which SKAT asserted a proprietary claim as the source of the payments to be made. The contractual terms agreed between the Sanjay Shah Defendants and their representatives cannot be allowed to trump the Court's decision on the issue of whether the Sanjay Shah Defendants should be permitted to use funds to which SKAT claims a proprietary interest to meet their legal expenses.
29. Nor, in my view, is it material to the particular order I have been asked to make that the restraint orders which are currently limiting the use of many of the Unclaimed Assets have been obtained (as I shall assume) by other emanations of the Danish state. The order which I have made provides funds for the Sanjay Shah Defendants to be legally represented for the next 6 months, but also acknowledges SKAT's legitimate interest in minimising the extent to which funds in which it claims an interest are used to defend the proceedings it has brought. I am satisfied that there is no unfairness to either party in that order. Further, in circumstances in which SKAT is not objecting to the use of funds in court to meet the Sanjay Shah Defendants' legal expenses, but merely seeking orders which ensure that this only happens to the extent necessary, I do not derive any assistance from the submissions as to the alleged *volte face* by SKAT.



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30. The parties are asked to agree the undertakings and other ancillary orders which were referred to, but not debated, at the hearing. In addition, the Sanjay Shah Defendants should provide an updated figure for the amount of the payment out on the basis I have ordered.