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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
COMMERCIAL COURT (QB)
[2022] EWHC 1637 (Comm)



No. CL-2018-000304

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 6 May 2022

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

(1) NAVIGATGOR EQUITIES LTD
(2) VLADIMIR ANATOLEVICH CHERNUKHIN

Claimants/Respondents

- and -

OLEG VLADIMIROVICH DERIPASKA

Defendant/Applicant

MR J. CROW QC and MR J. WEALE (instructed by Quinn Emanuel) appeared on behalf of the
Claimants/Respondents.

MR G. PIPE (instructed by RPC) appeared on behalf of the Defendant/Applicant.

J U D G M E N T
(Via Microsoft Teams)

MRS JUSTICE COCKERILL:

- 1 In terms of the decisive part of this judgment, I am going to adjourn this trial. I accept the submission which has been made on behalf of Mr Deripaska that a fair trial is not possible in May 2022.
- 2 There are two main aspects that were originally relied on: counsel and solicitors. The claimants have suggested briefly in the skeleton argument, and at greater length in correspondence, that the current legal team is bound to continue to represent Mr Deripaska at the trial. What is said:
 - “29. The current position is that RPC are on the record and (so far as the Claimants are aware) RPC have not made any application to come off the record. As such, they are professionally obliged to continue acting for Mr Deripaska.
 30. It is equally difficult to identify any basis for the Deripaska Counsel Team to withdraw from the case unilaterally, particularly at this late stage.”
- 3 Orally before me Mr Crow QC has said that solicitors on record cannot pick and choose which hearings to represent clients at. *A fortiori* where, as here, where they have been on the record for four years and a hearing date has been fixed for five months, they are not entitled to choose not to attend the trial. He has also drawn attention to the fact that there is no prevention from representation; only for being paid, and that this is a self-interested commercial decision, which is particularly striking in circumstances where RPC have chosen to apply for a licence in other proceedings, and in circumstances where the application for a licence could have been made in these proceedings and would be likely to be granted. In addition, a question of timing has been raised in that it should have been apparent on 4 February when VTB was sanctioned that a new payment would have been needed.
- 4 So far as RPC's position is concerned, I do not really accept these submissions. The bottom line is that at the moment Mr Deripaska cannot pay RPC for legal representation. It is true that RPC has not yet applied to come off the record, but has sought to do something rather different, to manage an orderly transition. So it is on the record and I accept the submission that it does at the moment remain bound to continue to represent Mr Deripaska, but it only remains bound to continue to represent Mr Deripaska until it comes off the record.
- 5 That says nothing about whether they are entitled to come off the record. As to that, since at the moment Mr Deripaska is unable to pay the professional fees of RPC, there would *prima facie*, seem to be, in the usual way, good cause for solicitors to come off the record. While there may well be a fight, it certainly cannot be said at this stage that RPC would be obliged to stay on the record. The fact that they have, it might be said, properly and constructively sought to manage the transition rather than force the issue on coming off the record, should not count against them.
- 6 I do not accept that the other proceedings really take matters any further. Those are different proceedings and either they are entitled to come off the record or they are not in these proceedings. In those proceedings it is a very different situation. RPC have

apparently themselves given an undertaking in those proceedings and it may well be that they cannot entirely extract themselves from the litigation as a result.

- 7 The bottom line here is that even if RPC were to remain on the record or were bound to remain on the record, they could not properly represent Mr Deripaska at the trial without counsel. So, in the final analysis, when one looks at the question of solicitors and counsel, I regard the question of counsel as being more of a killer point.
- 8 In so far as this is concerned, the facts are that the counsel team have come off the record effectively; they have returned their briefs. They have not prepared the hearing. Now, there as a suggestion in correspondence that they were not entitled to return their briefs. That is not said in the skeleton argument. Nothing was said in the skeleton argument at all apart from that it was difficult to see how they could withdraw. It has been said orally before me that it is up to Mr Deripaska to show that they were entitled to withdraw, and they can only withdraw if reasonable notice is given, and no such notice was given. So, there was no positive invitation to me to rule that the counsel team were in breach, but rather a question of pointing out the obligations and suggesting that the RPC evidence was not sufficient to enable me to reach a ruling that they were entitled to withdraw.
- 9 So far as this is concerned, as I indicated in argument to Mr Crow, I take the view that any suggestion in this regard, since counsel has not otherwise been present, should have been made openly in the skeleton and in my view counsel involved should have been offered the opportunity to make submissions before there was any risk of my making a decision which might have serious professional consequences for them. That was not done. While the point was taken on its face in the correspondence, the skeleton on its face actually backed right off from the point. I do not regard it as satisfactory to half-make a point when that has not been made in the skeleton.
- 10 All of this in any event matters not; because the evidence which is before me is that the previous counsel team of three barristers who were already well familiar with the case were instructed on the basis of a seven-week brief period, based on the complexity of the issues, and the fact that this is a very serious hearing in relation to which Mr Deripaska's liberty is at stake. In those circumstances I do accept that even if it were the case that RPC were obliged to continue, even if RPC did get a licence or Peters and Peters got a licence, there would be no time for counsel to read-in and prepare, even if it were the counsel who were already involved.
- 11 A submission has been made that the hearing is not as complicated as last time; that there is only one witness and they will not need to be cross-examined; it is mostly construction and undertakings; the skeleton is already in; the evidence is all in; the four day hearing is an over-estimate driven by the possibility of Jersey law and Russian law; that the seven weeks' prep time is an over-estimate, and it will be perfectly possible to come in now. I do not accept that submission. The hearing is and remains down for four days. As I have been told, the bundle last time was 4,000 pages plus one and-a-half thousand pages of authorities. It is manifest that the claimants are instructing a team with a very deep bench. Even if it were possible to find somebody who was prepared to act *gratis* it would be, as Mr Pipe says, brave, verging on foolhardy perhaps, for them to accept instructions at this stage.
- 12 I agree that it is inconceivable that a team could properly prepare this case coming in even today. Even if the case is not quite as complex as was anticipated, it is still a complex trial and hugely hard-fought, and essentially a complex piece of litigation. Counsel cannot properly represent their client without getting properly on top of the factual aspects of the

case. For example, Mr Deripaska is going to be subjected to doubtless detailed and searching cross-examination based on very detailed understanding of the factual position. The counsel representing him will need to be in a position to understand the facts sufficiently to understand on what re-examination is necessary and indeed possible. This can have very serious consequences because of course the number and extent of breaches, if any found, will have an impact on the question of sentence, which is naturally a serious consideration. Counsel will also need to be able to deal with certain points which, albeit construction points, depend on the factual underpinning to the construction case. They will need to be able to deal with difficult issues as to whether the steps taken are ones taken by Mr Deripaska. They will need to be able to satisfy themselves as to whether the skeleton argument which, I doubt not, is extremely long and complicated really does represent the correct way to go at things post the Court of Appeal judgment. So I do not accept that it is possible for counsel to get into this case and prepare it so as to ensure that Mr Deripaska has a fair trial.

- 13 That, in a sense, really disposes of the argument which has now been made very late in the day, and once the skeletons were in, that legal aid is available and should have been applied for, and that a fair trial is possible on this basis-- it being common ground that there is a right to legal aid and no absolute right to choose one's own counsel.
- 14 As I have said, I do not think this helps the claimants essentially because it is not possible to get a fair trial, even if legal aid is granted, because counsel, whoever they are, could not properly prepare in time. I would say that it is the more so in relation to legal aid counsel than the existing team or indeed a specialist team of commercial barristers who are familiar with cases like this. Legal aid counsel are unlikely to be able to get up to speed in a case of this nature nearly as quickly as an existing team or counsel who are experienced. Not only would it not be possible to get up to speed there is also the aspect that one might say that if there were an attempt to get in a team at this late stage, pitting a team with a very deep bench, very experienced, very long instructed with people of the highest standing within that team, against a team brought in at the absolute last minute on legal aid rates, one might well say that that becomes in itself unfair. There is potentially an analogy to *Bilta* where a transformation in possible line up (there of witnesses) transformed something into not being a fair trial. So far as the other points in relation to legal aid are concerned, they therefore become slightly by-the-by.
- 15 I accept that *prima facie*, Mr Deripaska is entitled to choice of counsel within limits, and it would be highly odd for him to be publicly funded when he is more than happy to pay himself. This in a sense dovetails into what I have already said about the legal aid team against the established team, I do not based my decision in relation to legal aid on the construction arguments. I would not tend to accept the arguments that legal aid is plainly available. I can see that the point is arguable, and that itself may carry with it difficulties and likely delays in terms of if legal aid were to be applied for, it not being forthcoming in the blink of an eye. So far as that is concerned the way that the Counter-Terrorism (Sanctions) (EU Exit) Regulations position was treated with a general licence is perhaps indicative.
- 16 I therefore conclude that there is no possibility of a fair trial in the current circumstances. That is a matter of particular importance, of course, in circumstances where this is a contempt trial with the potentially draconian and life-changing penalty sought by the claimants. It is therefore perhaps more than usually incumbent on the court to look carefully at the question of a fair trial.

- 17 So far as concerns other matters that might come into the consideration in exercising the discretion, obviously if it was a case where what was suggested was a complete derailment, that would weigh potentially heavily in the balance, but here there is a prospect of representation and we are not in that territory. Alternative legal representation has in principle agreed to act for Mr Deripaska and an application for the licence has now been made. What is sought is for the trial to be adjourned for a short period so that the defendant's new legal team can be instructed and prepare his defence accordingly.
- 18 I should also deal with the suggestion that something which should go into the balance is that this is said to be the latest of a series of attempts to delay. The story in this regard has been gone through in some detail in the claimant's skeleton. As I have indicated at the outset of this judgment, I can entirely understand why that would be the visceral reaction of the claimants in the circumstances. One might say that Mr Deripaska must expect his application to be scrutinised very closely, but I am indeed approaching this application on a sceptical basis, bearing in mind the background to this case, because I do accept that there is an unfortunate history there, which means that the position cannot entirely be taken on trust.
- 19 I would not, I should make clear, accede to this application unless I were satisfied on the facts before me, as applied to the correct legal test. However, at the same time, Mr Deripaska is entitled to the benefit of the correct legal principles, even if it were the case that he has in the past cynically tried to delay the hearing of the committal application. The suggestion that this is another attempt to delay is not a position which I can conclude on the basis of the evidence before me is borne out on the facts. The bottom line is that the fact of sanctions is indisputable.
- 20 While I understand points about why the application for a licence was not made earlier, and the delay in informing the other side regarding the termination of the retainer, and the points about why there has been no attempt to get legal aid before now, none of this really impacts on the practicalities. I have made the position clear as regards legal aid, but in terms of delay, even if there had been more expeditious action, RPC would, if they were obliged to remain on the record, still be in a position to say that the trial could not fairly go ahead on behalf of Mr Deripaska because it would still be the case that they would be entitled to apply to come off the record, and it would still be the case that counsel would have returned the brief. We are looking at a situation which has come along at a most unfortunate time and a situation where the only way out of this is to get an OFSI licence, and that that will inevitably take some time. Until that is done payment cannot be made, in particular, to counsel.
- 21 I should also deal with the submission that there is no guarantee that anything different would happen if I were to adjourn this and say that it should be heard in or around October. The submission that one does not know that anything will have got better, and that this is an important factor and that this therefore becomes effectively akin to an open-ended or entire derailment is not consistent with the concession that there is no reason why a licence would not be granted. It is plain from schedule 5, section 3 that the regulations expressly envisage a licence being granted. Indeed, the arguments as to delay are predicated on the fact that a licence will be granted, and on the submissions of the claimants that it could have been granted much faster if somebody had acted sooner.
- 22 Looking at the question of fair trial and those various discretionary factors, I would reach the conclusion that it is not possible to have a fair trial and there are no other discretionary factors which effectively produced a counter-weight to that conclusion. That is even before

one reaches the question of prejudice, and this, in my judgment, adds considerable further weight to the balance in favour of the decision for an adjournment.

23 It is worth restating here the relevant passage from *Bilta*.

"49(4) Fairness involves fairness to both parties. But inconvenience to the other party (or other court users) is not a relevant countervailing factor and is usually not a reason to refuse an adjournment.

This is again established by the authorities. As to fairness involving fairness to both parties, see Dhillon at [33(a)], Solanki at [35]. As to the requirements of a fair trial taking precedence over inconvenience to the other party or other court users, see Teinaz at [21]. But Mr Scorey acknowledged, as can be seen from the earliest cases, that uncompensatable injustice to the other party may be a ground for refusing an adjournment."

24 The position is that essentially if, as I have indicated, what we are looking at is a short and controlled delay, there is really no prejudice arising to the claimants from that delay. There has been really no allegation of prejudice. Mr Boswall's witness statement at para.25 deals with the question of prejudice and has never in fact been contradicted on behalf of the claimant.

25 Costs are the only potential area. They can be compensated in the ordinary way. The claimants have been paid £115 million odd in respect of the substantive proceedings before they launched their contempt application. All the avenues of appeal that are open to Mr Deripaska have been exhausted. The highest the point is put on delay is that the case has taken two years to come on since the application was launched, but this is not a question where what is being sought is time critical. This is essentially a question of an attempt to bring home to roost, in the form of some punishment on Mr Deripaska, breaches of orders in the past. There is no time criticality to that.

26 A submission was made that this case is in some ways analogous to *Maroil v Cally*. I see that one might say that but I rather prefer the view advanced by Mr Crow that these cases are fact-sensitive. My decision has therefore been made entirely on the facts of this case and not by reference to *Maroil*. One might say, as is so often the case with fact-sensitive decisions, that *Maroil* was at least as different from this case as it was similar in that one was looking at a much longer trial and no contempt.

27 In short, the law is clear. If a fair trial is not possible, an adjournment should generally be granted regardless of inconvenience. Balancing the evidence, I am satisfied in this significant hard-fought and complex case a fair trial would not be possible - however dim a view one takes of Mr Deripaska's past actions. That in itself provides an indication that the trial date should be vacated. This is the more so when there is no prejudice and what is contemplated is an adjournment for a relatively short period, and the issues in question are by no means time-critical.

28 Mr Crow indicated that this result would be paradoxical in that one would have a situation where a sanctioned person was relying on those very sanctions to avoid a trial that he does not want. That may well be the case. It may well be the case that the sanctions provide an argument which is from Mr Deripaska's perspective extremely fortunate. But that does not change the facts, which are that on the evidence before me I cannot but conclude that a fair

trial is not possible, and it would be appropriate, in the exercise of my discretion, to adjourn this trial.

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