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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QB)
[2022] EWHC 1711 (Comm)



No. CL-2020-000345

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 25 February 2022

Before:

MRS JUSTICE COCKERILL DBE

B E T W E E N :

(1) KWOK HO WAN
(2) ACE DECADE HOLDINGS LIMITED
(3) DAWN STATE LIMITED

Claimants/Respondents

- and -

UBS AG (LONDON BRANCH)

Defendant/Applicant

MR S. HOSSAIN QC and MR M. HOYLE (instructed by Marcus Parker Limited) appeared on behalf of the Claimants/Respondents.

MR D. QUEST QC and MR S. RALSTON (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Defendant/Applicant.

J U D G M E N T

(Remote Hearing)

MRS JUSTICE COCKERILL:

- 1 Despite Mr Hossain's very clear and reassuring and skilful arguments, I am going to grant permission to appeal in relation to grounds 2 to 5 only. Those represent really the meat of the issues between the parties, and I do so essentially for the reasons summarised at the start of Mr Quest's skeleton, which come very close to my own prior thoughts about the potential application as I concluded writing the judgment in this application.
- 2 It was quite apparent to me, both in the argument and in the writing of this judgment that the authorities in this area are difficult and unclear. I have alluded to that fact at, for example, paragraph 84 where I described the authorities as "*not entirely pellucid*", and at paragraph 110, where I say that the authorities do not speak with complete clarity. Indeed, one of the reasons I cited so much of Professor Briggs' work was that he highlights the lack of clarity, and it also seemed to me somewhat telling that, having his comments, both parties slightly edged away from citing him, which shows that he is a double edged sword; which merely reinforces that this is a rather tricky area.
- 3 In relation to Article 5.3, it is a case where there is no, on my analysis, English or European case that squarely deals with the point. All in all I do consider that there is a real prospect of success. There is enough nuance and lack of clarity within the EU authorities to give that. I was, myself, not unaware of the attractions of Mr Quest's argument during the course of argument. While I am satisfied with the result which I reached, I do consider that is a prospect, and a real prospect, that another judge would feel that Mr Quest's argument had the edge, and that the EU authorities ought to be clarified in his direction.
- 4 I also noted in the judgment that the issue arises in factual circumstances that are more complicated than has really been the case in previously reported challenges. I do consider that it has features which are admirably suited for testing the argument and discerning the correct line well. In such circumstances, one might almost say that there is some other compelling reason that permission be granted, but that has not been urged by Mr Quest.
- 5 Similar points can be made in relation to the Article 5.5 argument. I do not agree with a number of the points Mr Quest makes about my having overstepped in relation to the analysis of the authorities, or not having applied *flyLAL* in relation to 5.5, but it does seem to me that in relation to 5.5 as well, the question of whether there is a requirement for tortious involvement. Quite where the line lies as a matter of law is still live on the authorities, and again this offers a very good opportunity on interesting and nuanced facts to stress, test and clarify what *flyLAL* means.
- 6 So on both points it is an opportunity which I consider the Court of Appeal would welcome, and if I did not grant permission I am entirely confident that they would. It is also a case where the nature of the case means that they are as well placed to decide these points as I am. I understand what Mr Hossain has said about delay, but, of course, as a jurisdictional case, the Court of Appeal will, I am sure, try to get to it quickly and they are moderately well placed to do so at the moment, I believe.

L A T E R

- 7 In relation to costs I am going to give 85 per cent. It is not a huge bill. I, largely, do not like arguments about "*their bill is as big as ours*", because the bill could be equally excessive on the other side, and frequently is; but it does at least provide a sense check in the sense of not

out of step with each other, which can, on occasion, give an indication. Here it is just a neutral factor.

- 8 There is a small amount in relation to the partner rates because of the 2022 rates. I do not think that the 60 per cent recovery point really assists. That cannot make good any straying over the line because it is a contingent element. It ought to have come down further if it was within the guidelines.
- 9 So far as partner time is concerned, again there is a little bit in this. It is not a big issue, and similarly Mr Isaac's involvement, while I entirely understand the good sense of what has been done, there will be a degree of extra time involved in this instance - Mr Hoyle getting into the case where Mr Isaac was already involved. So there will be a small element of this.
- 10 So all in all, it seems to me that that is sufficient to take it down to 85 per cent of the total sought. So far as timing is concerned, 14 days. There needs to be something. I see the point that it would have been 14 days from a week ago, but people are generally entitled to assume that it is 14 days from the hearing date, and so be it.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.