

Case Nos: BL-2021-001939
BL-2021-002082

[2022] EWHC 3720 (Ch)

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

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

Date: Tuesday, 5 July 2022

Before :

HHJ Hodge QC
Sitting as a Judge of the High Court

Between :

Barclays Bank Plc

Claimant

- and -

(1) Scott Dylan
(2) Gareth Michael Dylan
(3) Sally Ann Glover
(4) David Samuel Antrobus

Defendants

And between:

Barclays Bank Plc

Claimant

- and -

(1) Fresh Thinking Group Limited
(2) James Mason
(3) INC Travel Group Limited

Defendants

Mr Andrew de Mestre QC and Mr James Knott (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**

Mr Andrew Latimer (instructed by **Brabners LLP**) for the **Respondents** (Mr Gareth Dylan, Mrs Sally Glover, Mr David Antrobus, and Mr James Mason)

Mr Doug Cochran (instructed by **Pannone Corporate LLP**) in an observational capacity for the First Defendant (Mr Scott Dylan)

Hearing date: **5th July 2022**

APPROVED JUDGMENT

Tuesday, 5 July 2022

His Honour Judge Hodge QC:

1. Having delivered an extemporary judgment this morning on Mr Latimer's application on behalf of the respondents for an adjournment of the return date for the continuation of these freezing injunctions, and having dismissed that application, so that the return date proceeded as an effective hearing, I now inevitably have to address the issue of the incidence, and the basis of assessment, of costs.
2. I deal first with the costs of the adjournment application which, so far as the respondent/claimant are concerned, are said to be relatively minor. The adjournment application was made and refused. In the normal way, therefore, costs should follow the event and fall to be paid by the respondents to the claimant. However, Mr Latimer, who appears for the respondents, has directed my attention to a series of three letters in May 2022, which, he says, should result in there being no order as to the costs of the adjournment application. The first of those letters was from Eversheds Sutherland (International) LLP, the solicitors for the claimant, to Brabners LLP, the solicitors for the respondents. That letter referred to the claimant's wish to deal with the further return hearings by consent, and in advance of the finalisation, filing and service of the claimant's evidence in reply, which in the event was served on 1 June 2022. In a further attempt to avoid the costs of that work being incurred, the claimant said that it was prepared to agree to the recoverable costs to date being costs in the case in return for the respondents agreeing to the continuation of the freezing orders until trial or judgment.
3. The response from Brabners was contained in a without prejudice save as to costs letter of 17 May 2022. Brabners proposed, first, that the parties should agree to mediate on the two days set aside for the further return hearing - today and tomorrow – and, on that basis, that the further return hearing

should be adjourned to the first available date after 1 August 2022, with the freezing orders continuing pending that adjournment hearing.

4. That proposal was rejected by Eversheds Sutherland in a letter dated 19 May 2022. That letter reiterated the claimant's view that the court would inevitably renew the freezing orders and make costs awards against the respondents. In those circumstances, the claimant was not prepared to delay that inevitability any longer. To do otherwise would have the undesirable effects of further delaying the proceedings, which ought to be getting on to trial, and increasing the overall costs for all of the parties. In the light of that, the claimant's position was either: (1) that the respondents should now agree to the freezing orders continuing until judgment or further order, thereby enabling the further return hearings to be vacated and more time to be given to any ADR process; or (2) the respondents should continue to contest the continuation of the freezing orders against them, in which case the matter should remain to be determined by the court at the further return hearings today and tomorrow.
5. In my judgment that was a reasonable response from the claimant's solicitors. Mr Latimer submits that the respondents had made a genuine attempt to resolve the dispute but that attempt had fallen on stony ground because of the claimant's wish to recover its costs.
6. Mr de Mestre submits that the offer of ADR against a background of a temporary continuation of the freezing orders, with the continuing force of those orders until trial being left up in the air to be determined at a future date, should have no impact on the costs of the adjournment application. The respondents chose to apply for an adjournment, and it was unsuccessful. The fact that they had offered ADR on a basis that was unacceptable to the claimant, for reasons which have been

vindicated by the outcome of this hearing, should not affect the costs of the adjournment application.

7. As I say, I agree with that. The adjournment application was made and failed and the respondents who made that application should bear the costs of it.
8. So far as the costs of the freezing injunction are concerned, Mr de Mestre submits that those costs should be borne by the respondents in any event, save that the costs of the actual without notice hearing, but not of the preparation for it, should be reserved. Mr de Mestre makes the point that the issues that arise on an application for freezing relief are never revisited at trial. They are therefore unlike the costs of ordinary interim injunctive applications, where the basis for the grant of injunctive relief is effectively determined by reference to the balance of convenience, assuming that there is a serious issue to be tried.
9. I have been taken by Mr de Mestre to two first instance decisions in which, subject in the second case, to a reservation of the costs of the original without notice hearing (which were reserved), the costs of the application for freezing relief were ordered to be paid by the unsuccessful respondent to the successful applicant. The first of those decisions is that of Mr Justice Martin Spencer in the case of *Bravo v Amerisur Resources plc* [2020] EWHC 2279 (QB), reported at [2020] Costs LR 1329. In that case, at paragraph 53, Mr Justice Martin Spencer agreed with counsel's submission that the regime for the making of freezing orders was different to the general position where interim injunctions were sought, based upon balance of convenience and holding the ring pending the trial. There were obviously overlapping features, holding the ring being one of them. But the purpose of a freezing injunction was to avoid a successful claimant being unable to enjoy the fruits of his success because there were no assets left against which any judgment could be enforced. That was

said to be a different kind of holding of the ring to that which was involved in the usual interim injunction and balance of convenience type case. In the circumstances, Mr Justice Martin Spencer did not consider it to be appropriate to make an order reserving the costs as he did not consider that the judge at trial was going to be in any better position than he was to adjudicate upon the costs of these applications, armed as he was with the information that he had, the previous judgments of another judge, and the arguments with which he had been presented.

10. It is noteworthy that in that case, Mr Justice Martin Spencer was referred to Mr Justice Neuberger's decision in *Picnic at Ascot v Derigs* [2001] Fleet Street Reports 2, where Mr Justice Neuberger had referred to the earlier reasoning of the Court of Appeal in the case of *Desquenne et Giral UK Limited v Richardson* [2001] Fleet Street Reports 1. In that case, the Court of Appeal had held that whilst, ultimately, the issue was one for the court's discretion, on an application for ordinary interim injunctive relief, neither party was successful or unsuccessful, and the appropriate order was costs reserved. Mr Justice Neuberger had referred to that decision in the *Picnic at Ascot* case, cited by Mr Justice Martin Spencer. At paragraph 52, Mr Justice Martin Spencer said that the decision in *Picnic at Ascot* and, by inference, the decision of the Court of Appeal *in Desquenne*, was not wholly apposite in claims for freezing orders, where the balance of convenience was not an issue, and where, in relation to the merits of the case, the court had regard to the question of whether there was a good arguable case on behalf of the claimants or not. He said that even if, at the subsequent trial, it turned out that the claims failed on the basis of the evidence adduced at the trial, it did not at all follow that this meant that the court had been wrong to find that there was a good arguable case, nor was there any reference to the balance of convenience. The question was simply whether it was just and convenient to make a freezing order.

11. The approach of Mr Justice Martin Spencer was followed in the short extempore judgment of Sir Michael Burton GBE in the case of *Darnitsa v Metabay Import/Export Limited* [2021] EWHC 1471 (Comm) at paragraph 2. There, whilst awarding the successful applicant for freezing relief its costs, Sir Michael severed off the without notice application and the costs which were specifically attributable to appearing at that without notice hearing, whilst taking into account the fact that all of the preparation and evidence for that without notice hearing was used for the on notice hearing between the parties. Sir Michael Burton therefore ordered that the costs, limited to appearance at the without notice hearing should be reserved, but that the balance of the costs, including those of the hearing attended by both parties, should be assessed and paid by the unsuccessful defendant. Mr de Mestre invites me to adopt that approach.

12. Mr Latimer submits that I should not do so. He makes the point that Sir Michael Burton's judgment is a short extempore judgment which does no more than follow, subject to a minor qualification, Mr Justice Martin Spencer's earlier decision. Mr Latimer points out that in Mr Justice Martin Spencer's decision, reference is made (at paragraph 47) to a Court of Appeal decision in *Taylor v Burton* [2014] EWCA Civ 21, where (at paragraph 43) it is stated that whereas, in times gone by, costs in case orders or claimant's costs in case orders were commonly made on interim injunction applications, nowadays they are more rarely made, and the winner of an interim application will commonly be awarded his costs there and then, regardless of what happens at the trial. Mr Latimer points out that that approach is inconsistent with that of the Court of Appeal in *Desquenne* and with the later Court of Appeal decision in the case of *Melford Capital Partners LLP v Wingfield Digby* [2020] EWCA Civ 1647, reported at [2021] 1 WLR 1553. There it was reiterated that where an interim injunction was granted, the court would normally reserve the costs of the application until the determination of the substantive issue, whilst recognising that, if special factors were present, an order for costs could be made, and those costs summarily assessed.

13. Mr de Mestre points out that *Melford Capital Partners* did no more than follow the previous decisions in *Desquenne* and *Picnic at Ascot*, and was a case on ordinary interim injunctive relief and not freezing injunctions.
14. I am satisfied that I should have regard to the first instance decisions of Mr Justice Martin Spencer and of Sir Michael Burton. The normal principle as to costs on an application for the grant and continuation of freezing relief is different to that on an application for ordinary interim injunctive relief. Costs should follow the event, save that the costs of the original without notice hearing, which afforded the respondent no opportunity of agreeing any form of freezing injunction by consent, should be reserved. Otherwise, however, the costs should follow the event. That, in my judgment, should be the normal rule, because the issues on an application for freezing relief are very different from the principles applicable on a grant of ordinary interim injunctive relief.
15. Mr Latimer submits that, in the present case, there are a number of reasons why I should take a different view. I have already rejected his submission that Mr Justice Martin Spencer's approach is inconsistent with *Melford Capital*. They are addressing different forms of interim relief. Second, Mr Latimer submits that in this case, the third proposed restructuring will be revisited at the trial, as will the question whether there have been breaches of the freezing order. I accept Mr de Mestre's counter-submission that, at trial, no one will consider the third restructuring in the context either of the arguability of the claimant's case or the risk of dissipation. Third, Mr Latimer points out that the claimant has agreed that costs should be reserved in relation to the first defendant, Mr Scott Dylan. Certain of the costs sought to be recovered from the present respondents will relate to the claim against him. Therefore, the trial judge should be left with a free hand in relation to all of the costs. I accept Mr de Mestre's counter-submission that the fact that, for pragmatic reasons, the claimant

agreed, as a term of avoiding a contested hearing, to costs being reserved in relation to Scott Dylan, should not prevent an order for costs being made, if otherwise appropriate, against the present respondents. The particular position of Mr Scott Dylan can be addressed when quantifying the payment on account of costs. It is no reason not to order the respondents to pay the costs of the application today.

16. However, there are additional reasons why I should award the claimant its costs of the freezing relief application and hearing. First, I am satisfied that the respondents should have acceded to invitations to indicate their position soon after the evidence was served upon them on 1 June. Because of the absence on holiday of the respondents' solicitor, and the consequent delay in arranging a consultation with leading counsel until 17 June, I would accept that the respondents may have been justified in waiting until shortly after that consultation to indicate their position; but I am also satisfied that, rather than holding silent and then, on 28 June, indicating that they would be making an adjournment application, they should have caved in at that stage. That is a matter of conduct to which the court is entitled to have regard on the issue of the incidence of costs.

17. But, in addition, there is the letter to which I was taken by Mr de Mestre of 29 March. That contained an offer to avoid the parties incurring further time and costs in relation to the freezing orders, in circumstances where it appeared inevitable that they would be renewed. The proposal contained in that letter involved a considerable reduction in the level of costs that was to be sought by the claimant from these respondents. That offer was subsequently repeated. The letter made it clear that should the offer be declined, then the claimant would be seeking its costs on an indemnity basis from 4.00 pm on 6 April 2022 or, if earlier, the date of the rejection of that offer. Had that offer been accepted, it would have saved the claimant incurring substantial additional costs, which in the event have proved unnecessary. That is a further factor which, at least in relation to the period

after 6 April 2022, would justify an order for costs in the claimant's favour. But, as I say, and as has been held in the two freezing injunction cases to which I have referred, the general approach of the court should be to treat applications for freezing relief as wholly discrete from the issues in the underlying substantive litigation. They involve consideration merely of whether the claimant has demonstrated an arguable case, has demonstrated a risk of dissipation of assets, and a consideration of whether the grant of injunctive relief is just and equitable. None of those are matters that properly fall to be considered at trial, where it is whether the claimant has proved its case and not merely whether it is arguable.

18. For all of those reasons, therefore, I will order the respondents to pay the claimant's costs of the freezing injunction applications, save for the costs of the actual without notice hearing in each case, which will be reserved. In the light of the offer contained within the 29 March letter, it seems to me appropriate that whilst those costs will fall to be assessed on the standard basis prior to 6 April, they should be assessed on the indemnity basis thereafter. Had the respondents taken the sensible approach of accepting that offer, the liability they will have to bear for those costs would have been considerably reduced; and the claimant would have saved considerable additional costs in preparing its reply evidence. In my judgment, the appropriate order as to the basis of assessment is that the respondents should bear the costs on the standard basis up to 6 April and on the indemnity basis thereafter. It is common ground that, given the level of costs, and the fact that this hearing was estimated originally for two days, I should order a detailed assessment, but with a payment on account of costs in the meantime.