



Neutral Citation Number: [2024] EWHC 2720 (Comm)

Case No: CL-2020-000627

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 28/10/2024

Before :

CHRISTOPHER HANCOCK KC SITTING AS A JUDGE OF THE HIGH COURT

Between :

- (1) YANGTZE NAVIGATION (ASIA) CO.,
LIMITED
(2) BERGE BULK SHIPPING PTE LTD

Claimant

- and -

- (1) TPT SHIPPING LIMITED
(2) TPT FORESTS LIMITED
(3) TAUMATA PLANTATIONS LIMITED
(4) TIAKI PLANTATIONS COMPANY
(5) OTPP NEW ZEALAND FOREST
INVESTMENTS LIMITED

Defendant

Timothy Young KC and Michal Hain (instructed by **HFW**) for the Claimants
Simon Rainey KC and Christopher Jay (instructed by **Campbell Johnston Clark Ltd**) for
the **Second Defendants**
David Bailey KC and James Goudkamp (instructed by **Herbert Smith Freehills**) for the
Third to Fifth Defendants

JUDGMENT

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on Monday 28
October 2024.**

CHRISTOPHER HANCOCK KC

Introduction

1. In this judgment, I deal with the Claimants' application for permission to appeal to the Court of Appeal against my judgment as handed down on 18 September 2024, and the applications made by the Second Defendants (“**Forests**”) and the Third to Fifth Defendants (“**the Exporters**”) for interim payments on account of costs.

Permission to appeal.

2. I can deal briefly with the appropriate test, which I do not understand to be in dispute. CPR Pt 52.6(1) provides that permission to appeal “*may only be given where—(a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard*”. In R (a Child) [2019] EWCA Civ 895; [2019] 2 FLR 1033 at [31], Peter Jackson LJ said as regards limb (a) that it requires that there “*be a realistic, as opposed to fanciful, prospect of success*”. I adopt this as the test to be applied.
3. The Exporters also drew my attention to certain authorities suggesting that there is a very strong presumption against granting permission to appeal in connection with jurisdictional challenges. In Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460 (HL) at 465, Lord Templeton said that “[a]n appeal [against a decision made as regards a jurisdictional dispute] *should be rare and the appellate court should be slow to interfere*”. That passage was approved and amplified by a unanimous Supreme Court in Lungowe v Vedanta Resources plc [2019] UKSC 20; [2020] AC 1045 at [6]–[14].

The application as against Forests.

4. Of the three grounds of appeal put forward by the Claimants, only one (the third) related to Forests. This was a proposed appeal against the finding that Forests was not a party to the LOIs issued at the discharge port.

The submissions of the parties.

5. I can deal with this application relatively briefly.
 - (1) For their part, the Claimants submitted that I was wrong to make findings about the intention of the participants to various written exchanges at the time of discharge without hearing evidence from those individuals, and that in the context of a jurisdiction hearing this was the wrong approach.
 - (2) Forests and the Exporters both made submissions in this regard, which were to the same effect. They said that I had to do the best I could on the material available; that it would be wrong to defer consideration until I could hear oral evidence; and that my conclusion was based on logical grounds, being the fact that it would be illogical to find that Forests had opened itself up to a liability that it had strenuously sought to avoid by setting up Shipping, and that Forests had its own independent interests in being asked whether it objected to the issuance of an LOI by Shipping.

Conclusions.

6. I have concluded that the Claimants' case in this regard is clearly ill-founded, and that they have no real prospect of success. There was no real dispute on the law in this case; the Claimants' complaint is as to the application of that law to the facts; and I had no doubt at all, on the basis of the material before me, as to the correct answer. As I indicated in my judgment, it is my view that it is clearly not open to a party on a jurisdictional challenge to say that something might turn up on disclosure or in cross-examination to make good an essential jurisdictional assertion.

The application as against the Exporters.

7. I turn to the application as against the Exporters.

The parties' submissions.

8. Under this heading, the Claimants put forward two grounds of appeal, as follows:
 - (1) First, they argued that I was wrong to hold that Shipping did not enter into the Charters on behalf of the Exporters.
 - (2) Secondly, they contended that I was wrong to hold that Shipping did not enter into the LOIs on behalf of the Exporters.

Ground 1.

9. As to this ground, the Claimants argued as follows:
 - (1) There was no reason given for my finding that the arrangement here fell under clause 5.2.1(f) of the LMSSA, rather than clause 5.2.1(c). No documentation had been provided in support of this suggestion. There were no offers or acceptances of the type that would have been expected if this was the relevant arrangement.
 - (2) No sufficient evidence was before me to support the suggestion that Charters were entered into by Shipping before knowing whose cargo would be shipped on board the vessels being chartered. It was inappropriate to form a view on this before a full trial.
 - (3) My judgment did not take sufficiently into account the evidence of Shipping's audited accounts, and my holding that to understand the accounts one required expert evidence was to treat this as a final trial and not a jurisdictional hearing.
 - (4) Overall, I should have held that there was a sufficiently arguable case to go forward to a hearing to determine whether the Charters were entered into on behalf of the Exporters.
10. The Exporters submitted, in summary, that the Claimants had no real prospect of success on an appeal.

- (1) Firstly, they pointed out that the Claimants do not allege any breach of the Charters and rest their claims solely on the LOI. Since there is no claim for breach of the Charters, this point is academic, or only relevant as background to the claim based on the LOI.
- (2) Secondly, they said, contrary to the Claimant's submissions, the Court did make clear its reasons for holding that clause 5.2.1(f) of the LMSSA was engaged in this case.
- (3) Thirdly, again, contrary to the Claimants' submissions, they said that the 2012 Agreement was referred to and relied on in detail. Thus, said the Exporters, I held that "[t]he contractual documents that have been disclosed (both the LSMAAs and SSA) show quite clearly that Forests were only ever intended to act as an agent for the Exporters and not as a principal. I see no reason to doubt the veracity of these documents".
- (4) Fourthly, say the Exporters, the Claimants' suggestion that further relevant documentation might arise on disclosure is misguided. The mere possibility that additional documents might emerge on disclosure is not a proper reason for permitting a speculative claim to continue. Thus, in Vedanta at [45], Lord Briggs said that in a jurisdictional dispute "*the claimant cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure*". Further, the prospect that some critical document would be revealed on disclosure is very low given that, and as the Court observed, "[t]here has [already] been a very large amount of disclosure over time in this case", see the Judgment at [61(iv)(b)].
- (5) Fifthly, the Exporters addressed the Claimants' contention that the Court's conclusions as regards the Charters "*were in fact inconsistent (or at least very difficult properly to reconcile) with the audited accounts of Shipping*". The Claimants' concession in the parenthetical text, said the Exporters, is important in circumstances where they are obliged, in order to succeed, to point to evidence that is only consistent with an agency relationship, see the Judgment at [20] quoting The Magellan Spirit [2017] 1 All ER (Comm) 241 at [29]. But in any event, the submission does not assist the Claimants, because the burden was on the Claimants to provide the necessary explanation of the accounts. In any event, the issue of whether the Exporters and/or Forests were undisclosed principals turns on all of the relevant circumstances, see, e.g., The Astyanax [1985] 2 Lloyd's Rep 109 (CA) at 113. The accounting evidence was, in this case, merely one factor among many. Even if that evidence had the effect for which the Claimants contend, it would not trump the many pointers against the existence of an agency relationship, and in particular the documents.

My conclusions on Ground 1.

11. I have concluded that the Claimants have not established that they have any real prospect of success on appeal on this point, and that none of the Claimants' submissions indicates that they should be allowed to pursue this contention further. My reasons for this conclusion are to a large extent those which led to my judgment, and are as follows:

- (1) I agree with the Exporters that this ground is only relevant as background to Ground 2. There is no claim for breach of the Charters. That does not mean that the claim is irrelevant; but it does mean that is only relevant as part of Ground 2.
- (2) I agree that much of the Claimants' criticism of the judgment really takes one nowhere. The most fundamental criticism is that because they could not take matters further, they did not have the opportunity to obtain further disclosure and cross-examine witnesses. In my judgment, this is to look at matters the wrong way round. Matters should only be allowed to go further if there is a plausible basis for the English Court to assert jurisdiction – here there was not.

Ground 2

The parties' submissions.

12. The Claimants' argument was as follows:

- (1) If I was wrong in my conclusion that the Exporters were not party to the Charters, then Exporters must have been and thus would have had the right or obligation to issue LOIs.
- (2) My other conclusions were dependent on the lack of evidence as to the making of Requests for Authorisations pursuant to the procedures laid down in the LMSAAs.
- (3) None of my reasons had to do with whether the LOIs were issued pursuant to authorisations given by Exporters rather than Forests.
- (4) My conclusions did not allow for the possibility of cross-examination, and in particular cross examination as to whether the provisions of the LMSAAs were in fact followed in practice.

13. The Exporters argued that the Claimants did not address the fact that (a) the LMSAAs provided for a request for authorisation procedure; and (b) there was no evidence that any requests to issue LOIs on the Exporters' behalf had been made pursuant to that procedure let alone approved. The Exporters also contended that the Court should reject the Claimants' suggestion that the lack of documentation is simply due to a failure in disclosure. The Claimants are simply repeating their submission that because something might materialise on disclosure, summary disposal of their claims is impermissible, and that submission is clearly wrong for reasons given earlier. The position is *a fortiori* here given that the prospect that important documents supportive of the Claimants' case will come to light is very low given the scale of disclosure already provided.

My conclusions.

14. Again, I have reached the conclusion that the Claimants have no real prospect of success on appeal on this point. My reasons in brief for this conclusion are as follows:

- (1) The first submission made is on the footing that I was wrong in relation to Ground 1. For the reasons already given, I have concluded that this suggestion is hopeless.
- (2) The last submission is again based on the lack of opportunity to cross-examine. For the reasons already given, I regard this as a submission that is misconceived.
- (3) That leaves the submissions relating to the requests for authorisations. My reasons did indeed have to do with the lack of evidence of any request for authorisation of the type provided for in the LMSAAs. As such, there was no plausible basis for the Claimants' claim, which was based entirely on speculation; and my reasons did have to do with the question of whether the LOIs were issued pursuant to authorisations given by Exporters, which would, on the face of the documents, have to have been in accord with the procedure for such, which they were not.

Interim payment.

15. The relevant principles under this heading were not in dispute, and appear clearly from the decision of Christopher Clarke J (as he then was) in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 Comm. In that case, he said as follows:

"14. CPR 44.2(a) provides that the court, "will order" a paying party "to pay a reasonable sum on account of costs unless there is good reason not to do so". This was and is the rule in place from April 2013 replacing the former rule that the court "may order an amount to be paid on account before costs are assessed". Under the new rule there is thus a presumption that a payment will be made, subject to an exception, and a specific criterion as to amount.

15. There is some authority which refers to the criterion of "irreducible minimum", e.g. Beach v Smirnov [2007] EWHC, 3499 or similar expressions. Several of the cases were decided before the rule changed. In Mars UK Limited v Teknowledge Limited [2000] SFR 138, Jacob J, as he then was, said that, "a payment of some lesser amount, which he will almost certainly collect" was a closer approximation to justice than saying that you need time to work out the total of the costs".

16. In Blakemore v Cummins [2010] 1 WLR, 983 Elias LJ, giving the judgment of the Court of Appeal, accepted that in determining whether or not to make any order it was important to consider that a party should not be kept out of money which will almost certainly be demonstrated to be due longer than was necessary. That case was, however, connected with what was described as the "first issue" whether or not any order should be made and not, "the second issue", i.e. quantum. It was also decided when the previous rule was in force. Lord Justice Elias referred in the context of the first issue to the discretion under

the rule as a “ wide one ”. He did not lay down that the “ irreducible minimum ” test must be applied to the second issue.

17. In United Airline Inc v United Airways Limited, 2011 EWHC 2411 , Vos J, as he then, was decided in a judgment ex tempore in this respect, that what he had to determine, “ is not the irreducible minimum that is likely to be awarded but a reasonable estimate of what is likely to be awarded .” In the course of argument at the end of the application for summary judgment he had referred to a case which, as he thought, went further than Mars . Counsel, apparently misreading a paragraph of CPR 44.3.12 of the then current White Book , suggested that the case was Dyson Appliances Limited v Hoover Limited [2001] EWCA 1440 (which it was not). The White Book has cited Beach v Smirnov as authority (which it was – see paragraph 11) for the proposition that “ justice requires that a sum of costs be paid provided there can be a reasonable assessment of the sum that is going to be likely to be awarded ”.

18. In paragraph 13 of Beach v Smirnov the judge then said that it seemed to him that there was “ at least an irreducible minimum of costs which I am going to be ordered (sic) to be paid – a sum which is very likely to be exceeded by the order following detailed assessment. ” That sum satisfied the former criterion but was not put forward as the criterion itself. Dyson was, as the White Book rightly stated, distinguished in Beach v Smirnov in relation to the issue of whether costs on account should be ordered at all.

19. United Airline was followed by Warren J in Gollole v Pryke Chancery Division, unreported, 29 November 2011 . Gollole has also been followed in Kellie v Wheatley & Lloyd Architects Limited [2014] EWHC 2886 , Football Association Premier League Limited v Berry [2014] EWHC, 726 , and Mehjoo v Harben & Barker [2013] EWHC 1669 .

20. In VTB Bank v Skurikhin [2014] EWHC 3522 , Simon J referred to Mars UK and to the change in the rules, (although his citation of the new rule was that it provided for a payment to be made on account of costs unless there was good reason not to do so, i.e. he did not refer to the words “ a reasonable sum ”) and awarded an amount which he thought reflected an irreducible amount of what would be recovered. United Airline does not appear to have been cited.

21. In Hospira UK Ltd v Genentech Inc [2014] EWHC 1688 , Birss J held that it was clear:

“that the principles applicable to the assessment of a payment on account are and remain since they were first set out by

Jacob J as he then was in the Mars v Teknowledge case. The task of the court is to ensure that it finds the irreducible minimum, which would be recovered”.

In Rovi Solutions Corporation v Virgin Media Limited [2014] EWHC 2449 , Mann J took into account the test in Mars UK and regarded an irreducible minimum as the test. In Teva UK v Leo Pharma [2014] EWHC 3522 , Birss J strove to find “ a fair irreducible minimum ” and said that it would be useful for the figure to be “ not too much below ” the likely level of a detailed assessment.

22. I do not, with respect, agree with the formulation by Birss J of the task of the court in Hospira . It is clear that the question, at any rate now, is what is a “ reasonable sum on account of costs ”. It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that “ irreducible minimum ” is the test. That would be to introduce a criterion (a) for which the rules do not provide’ (b) which is not the same as the criterion for which they do provide; and (c) which has potential drawbacks of its own, not least because it begs the question whether it means those costs which could not realistically be challenged as to item or amount or some more generous test. On one approach it admits of every objection to costs, which cannot be treated as fanciful.

23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.

24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”

16. I do not understand there to be any dispute as to these principles. Accordingly, I adopt this as a statement of the relevant approach to be adopted.

The claim by the Exporters.

17. The Exporters claimed a total of £880,994.49. They asked for an interim payment of 65% of that amount, being £572,646.42.

18. In relation to the amount of their costs, they made the following submissions:

- (1) Their costs were proportionate to the amount claimed, which exceeded US\$6,000,000.
- (2) They had had to respond to unrelenting and disproportionate requests for disclosure, generating costs of some £240,000, which were clearly ill founded in the context of a jurisdictional dispute, which was not supposed to involve a mini-trial.
- (3) The fact that the solicitors rates were in excess of the guideline rates was really nothing to the point. Those were only guidelines; the dispute here justified higher rates; there was appropriate delegation; the witness evidence served was limited; one of the relevant witnesses was overseas; costs were saved because the Exporters relied on Forests' evidence and arguments; and Counsel's fees were in line with the normal guidelines.
- (4) The fact that the election point fell away should not affect the award of costs.
- (5) The contrast with the Claimants' own costs is overstated.

19. Turning to the appropriate discount, they made the following points.

- (1) There should be no difficulty in recovering the money from the Exporters if there turns out to be an overpayment. They are major commercial entities.
- (2) The application for permission to appeal is unlikely to succeed.
- (3) The detailed assessment will take some time.

20. In all the circumstances, a payment of 65% of 70% to the amount claimed is justified, said the Exporters.

21. The Claimants, for their part, argued that the amount claimed was excessive for the following reasons:

- (1) The solicitors' rates were multiples of the guideline rates.
- (2) The NZ lawyers fees (of £150,000) cannot be recovered.
- (3) Brief fees were also excessive (at £144,000, with advice at £80,000).

22. In my judgment, it is reasonable to assume that a total of over £572,000 will in fact be recovered, given the points made on both sides. Erring on the side of prudence, I order that £550,000 should be paid by the Claimants by way of interim payment to the Exporters. This liability is joint and several.

The claim by Forests.

23. Forests claimed a total of £700,000 by way of costs. They asked for an interim payment in the amount of £455,000, being 65% of that sum, on the basis that they would expect to recover 70% of their total costs following detailed assessment.
24. The Claimants argued that Forests' costs were excessive and would be reduced on detailed assessment. They contended that Forests should recover no more than £200,000. Their specific criticisms, which were brief, were as follows:
- (1) No New Zealand lawyers' fees (which totalled £12,600) could be justified; and no solicitors' fees attending NZ counsel could be justified, although the amount of such was not specified.
 - (2) Counsel's brief fees of £165,000 against a background of advisory fees of £130,000 were excessive.
 - (3) Solicitors could not have spent a total of more than 300 hours on the matter.
25. I consider that this application was both prolonged and excessive, and that the costs generated were, of necessity, substantial. I also consider that it is likely that Forests will indeed recover most of their costs, although I do have some doubts in relation to Counsel's fees, which are indeed substantial. In these circumstances, I do not consider that the very substantial reduction proposed by the Claimants is justified. Instead, I consider that the appropriate amount to award is a significant amount of the total amounts generated by the application. In my judgment, the amount of £400,000 is a reasonable assessment of the amounts that will be recoverable, and I therefore award this sum in favour of Forests. Again, the liability is joint and several.