Case No: BL-2021-000313
Neutral Citation Number: [2022] EWHC 2970 (Ch)

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

The Rolls Building
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Fetter Lane
London EC4A 1NL

Wednesday 9 November 2022

BEFORE:

MRS JUSTICE FALK

BETWEEN:

TULIP TRADING LIMITED
(a Seychelles company)

Claimant/Respondent

- and -

(14) ROGER VER

Defendant/Applicant

MR B FRIEDMAN (instructed by ONTIER LLP) appeared on behalf of the Claimant/Respondent
MR A CHARLTON KC & MR D KHOO (instructed by Brett Wilson LLP) appeared on behalf of the 14th Defendant/Applicant

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MRS JUSTICE FALK:

1. This is my decision on the application by Roger Ver, the 14th defendant in these proceedings, to set aside orders granting Tulip Trading Limited ("TTL") permission to serve Mr Ver out of the jurisdiction.

2. On 25 March this year I handed down judgment upholding jurisdiction challenges made by the 2nd to 12th, 15th and 16th defendants ([2022] EWHC 667 (Ch)) ("the March Judgment"). I found in favour of those defendants on the basis that TTL had not established a serious issue to be tried on the merits of the claim. In making directions for a consequentials hearing I ordered that one of the matters to be considered was whether the order I made should be extended of the court's own motion to cover other defendants. TTL opposed this for various reasons, including that it maintained that Mr Ver's control of the relevant network, being the BCH network (see the March Judgment at paragraph 2), was sufficiently different to the control by the other defendants of different networks, such that the order should not be extended.

3. The consequentials hearing in relation to the March Judgment was on 6 May. I did not extend the order to cover Mr Ver, or indeed the other defendants not covered by the March Judgment (that is, the 1st and 13th defendants). Shortly afterwards, on 12 May, TTL's solicitors informed Mr Ver's solicitors that, for the purposes of Mr Ver's jurisdiction challenge, TTL was prepared not to pursue the argument that there was a material distinction between Mr Ver and the other defendants. The parties then corresponded with a view to agreeing a draft order disposing of Mr Ver's application, but they failed to reach agreement. During June the application was listed for hearing in the present hearing window.

4. On 11 August Andrews LJ granted permission to appeal against my orders made in March and May ("the Related Appeals"). Permission was granted on the question of serious issue to be tried. That led TTL to invite Mr Ver to adjourn his application, and on 27 September TTL issued a formal application seeking to adjourn this hearing and to stay Mr Ver's challenge until after determination of the Related Appeals. That application for a stay was heard by Master Clark on 14 October and dismissed by her in a judgment given on 21 October.

5. It is important to note that Mr Ver limits his challenge to the serious issue to be tried question, and TTL is not now arguing that there is any material distinction between Mr Ver and other defendants. TTL accepts that if the other defendants' challenges succeed, it will not resist Mr Ver's application. Mr Ver has previously accepted that if the other defendants' challenges failed then he would not pursue his challenge.

6. In the circumstances, and where the stay application has been dismissed, one might wonder why this hearing was required. The real issues between the parties relate to (a) what happens in respect of the hearing of the Related Appeals in the Court of Appeal

and, if the matter proceeds further, what might happen in the Supreme Court; and (b) costs.

7. On the first of those points, the appeal to the Court of Appeal is due to be heard on 7 and 8 December this year. Mr Ver wants to be heard on that appeal, and indeed in the Supreme Court if the case gets that far. Although TTL has agreed that Mr Ver should have the opportunity to be heard as a non-party, Mr Ver is concerned that the Court of Appeal may not agree with that, particularly since there is some indication that his participation might be opposed by other defendants. Instead, Mr Ver wants an accelerated process for an Appellant's notice and a Respondent's notice, with a view to the appeals being listed together if possible. I note at this point that paragraph 25 of PD 52C places a positive obligation on parties to seek directions as to whether two or more appeals pending in the same or related proceedings should be heard together or consecutively by the same judges.

8. TTL is obviously very keen not to have the hearing in the Court of Appeal derailed by an adjournment being ordered to allow the appeals to be heard together, and it is concerned that Mr Ver may take action to seek to disrupt the appeal process. However, TTL has been willing to entertain an expedited timetable with a view to allowing the appeals to be listed together if that is possible without an adjournment occurring.

9. TTL's primary position before me is that this court should defer giving judgment on Mr Ver's application until after the Court of Appeal has handed down its own judgment. Its secondary position is that Mr Ver's application should be rejected now on the basis that, in light of permission to appeal being granted on the Related Appeals, there is in fact a serious issue to be tried. TTL refers to that as the "Threshold Issue". It puts a further alternative, if neither of the first two are accepted, that I should give judgment in Mr Ver's favour, grant permission to appeal but extend the time for the Appellant's notice until after the Court of Appeal's determination.

10. During the hearing this morning, TTL's underlying concerns became clearer, essentially that the correspondence had left them with the impression that Mr Ver was seeking to reserve the right to take steps to disrupt the appeal. Some of the specific concerns raised were addressed during submissions. In particular, Mr Charlton for Mr Ver made clear that he would not object to a direction shortening the period for the Respondent's notice, with a skeleton argument being required to be provided on the same day, or to the inclusion in the order of a recital accepting that for the purposes of the appeal Mr Ver is in a materially identical position to the other defendants. Mr Ver has not agreed that he would not raise any different points to the other defendants in the Respondent's notice, but Mr Charlton informed me that none had been identified so far. Rather, Mr Ver is just seeking to preserve the ability to raise a different point in case it occurs to his advisers when they consider the matter in more detail. Given that it is proposed that the Respondent's notice and skeleton argument would be filed some two weeks before the current date of the appeal hearing, I am not persuaded that this approach is unreasonable.

11. Further, Mr Ver would not commit not to apply to adjourn the hearing of the Related Appeals if the Court of Appeal effectively say that he is too late to join that appeal hearing as a party. Mr Charlton says that this issue is likely to prove academic because Mr Ver has already agreed that his submissions would be confined to one hour. I also understand that a joint letter to the Court of Appeal has already been discussed and, from what I can see, should be capable of agreement.

12. Turning to the alternative positions put forward by TTL, in summary I do not accept any of the options presented. Both the first one, delaying handing down judgment, and the third one, extending time for the Appellant's notice, involve an element of seeking to rerun arguments made before Master Clark, but I think there is a more fundamental reason to refuse to accede to the proposals. As regards the second, as I will explain, the cases relied on do not provide authority for the proposition being put.

Deferring judgment

13. Dealing first with the proposal that I should defer handing down judgment, as an initial point it is worth referring to the Master's decision to refuse a stay, reported at [2022] EWHC 2784. The application before Master Clark was to stay Mr Ver's jurisdiction challenge and adjourn this hearing. In her judgment she set out the procedural history in some detail, considered the principles applicable to staying or adjourning proceedings or a hearing and concluded that the main consideration was the balance of prejudice. She rejected TTL's argument that there is any general principle that a stay should be granted where a pertinent point of law was about to be determined, or that it is not possible to strike out a claim as having no real prospects of success where a higher court may be about to rule that it does.

14. The Master then rejected TTL's arguments as to prejudice caused by unnecessary costs being incurred and an argument about procedural chaos, saying that the Court of Appeal had flexibility to deal with expedited appeals. She accepted that there would be prejudice to Mr Ver if a stay was granted because he would be deprived of a right to be a party to and heard on the Related Appeals. She noted that TTL's proposal not to oppose Mr Ver being granted permission to be heard would not guarantee that the Court of Appeal would allow it, and further that Mr Ver would not be a party on any appeal to the Supreme Court. She took account of the fact that it was TTL's objection that stopped the order of 6 May extending to Mr Ver, saying that TTL should not be allowed to take advantage of a change in position to deter determination of the application, and also pointed to a delay in making the stay application.

15. TTL's argument that I should delay judgment until after the Court of Appeal's decision really amounts to a rerun of at least part of the debate before Master Clark, even though the argument is now limited to deferring judgment rather than staying the whole hearing. Whilst I accept that Master Clark's decision does not fetter my discretion on such a matter as to whether to delay handing down a judgment, her reasoning and the fact that the debate was held in full before her does strike me as a relevant factor to bear in mind. There is an element of a second bite at the cherry.

16. But there is a more principled reason not to accede to TTL's proposal. It just does not seem to me to be right in principle to defer judgment as a tool to ensure that the Related Appeals can proceed without any risk of disruption, by effectively excluding the opportunity for Mr Ver to be heard as a party. The listing and management of those appeals is for the Court of Appeal and not for me. I can grant permission to appeal, and I can make directions as to the timing of the Appellant's notice and any Respondent's notice, but my role is limited to that. I should not do more to affect the processes before the Court of Appeal by artificially (and I believe it would be artificially) delaying judgment.

17. In his skeleton argument, Mr Friedman for TTL relied on the fact that my judgment could be very short if it were given following the Court of Appeal's decision. I do not think that is a material factor. I have to point to the time and cost of this hearing and the fact that the judgment I am giving is relatively simple in any event. I have had to consider all the issues, including the Threshold Issue, in preparation for and at this hearing.

18. As to the risk of the decision I give being wrong, there is no issue between the parties, and I have no issue, with the proposition that it is appropriate for me to grant permission to appeal against my decision on the same grounds as Andrews LJ did. I would observe that I do not currently see any real value in also granting permission to appeal on the Threshold Issue as TTL suggested, even if I were minded to consider there was a real prospect of success on it, essentially because I think that that point will end up being academic.

19. Further, while TTL raises some complaints about the material difficulties it had in serving Mr Ver due to what it says was his uncooperative approach in refusing to confirm his location and refusing to accept service through his attorneys, such that his challenge could not be determined alongside that of the other defendants, it remains the case that there was no way in which my May order could have realistically extended to Mr Ver because TTL then argued that there was a material difference between him and the other defendants on the facts. Absent that, it seems to me that, in principle, the matter could have been resolved much earlier in a way that would have ensured Mr Ver could have been party to the appeal.

20. TTL also refers to the fact that Mr Ver previously accepted that if the other defendants' challenges failed, he would not pursue his challenge. In other words, he accepted he would not be heard in this court. But it does not follow from that that I should take steps now that are designed to ensure that he can have no right to be heard, as he wishes to be, in the forthcoming appeal. Rather, the management of the Related Appeals and appeals from this decision are matters for the Court of Appeal and not for me, subject to the limited points I made earlier.

Threshold Issue

21. I turn now to the Threshold Issue. I do not agree that the fact that permission to appeal has been granted by the Court of Appeal means that I must conclude that there is a serious issue to be tried and so dismiss Mr Ver's application. Permission to appeal was granted on the basis there is a real prospect of success, but that means the judge granting permission to appeal formed the view that it was arguable, with a real prospect of success, that I fell into error in concluding that the matter was susceptible to summary determination. It is a decision that there is a real prospect of success on appeal, but not a decision that Mr Ver's jurisdiction challenge should fail on the grounds there is a serious issue to be tried. While the test for the latter also requires a real prospect of success, that is directed at the merits of the underlying claim and not at the prospects on appeal. The merits of the claim is the substantive issue to be considered by the Court of Appeal on 7 and 8 December. It has not yet been considered, and in the meantime the March Judgment stands.

22. I do not agree that the cases relied on by TTL support the proposition said to derive from them, namely that where a legal point that has been decided and which would otherwise render a claim as having no real prospects of success, is itself subject to an appeal with real prospects of success, that means that the claim cannot be struck out as having no real prospects of success. I note that these cases were also unsuccessfully relied on before Master Clark.

23. The first case is *Derby & Co Ltd v Weldon & others (No 5)* [1989] 1 WLR 1244. That was a strike out application brought on the basis that the law of conspiracy was limited by a Court of Appeal decision, where that decision was under appeal to the House of Lords. Vinelott J held at p.1250 that the court was "entitled and indeed bound to take into account the possibility that a decision of the Court of Appeal may be reversed by the House of Lords". He also noted at p.1253 that the appeal was likely to be heard before the case was ready for trial, and pointed out that it was absurd to grant a strike out only for the case to be reinstated if the Court of Appeal's decision was reversed by the House of Lords.

24. The second case is *Johns v Solent SD Ltd* [2008] EWCA Civ 790, where the Court of Appeal refused an appeal seeking to strike out an employment claim in circumstances where a determinative point on the claim was due to be considered by the European Court in another matter, referred to as the *Heyday* case. In that case the Employment Tribunal had struck out Mrs Johns' claim having formed the view that the challenge to the relevant UK legislation in *Heyday* would be very likely to fail. The Employment Appeal Tribunal allowed the appeal on the basis that it was wrong to prejudge *Heyday* in the way the Tribunal had, and the Court of Appeal dismissed the appeal from the EAT. Smith LJ (with whom Keene and Pill LJJ agreed) found that the Employment Tribunal had based their reasoning on unwarranted speculation about the *Heyday* case (see paragraph 15). He said at paragraph 20 that the Employment Appeal Tribunal was justified in concluding that the challenge in *Heyday* might succeed, and further noted that if it did and the relevant legislation was struck down then Solent had accepted that

Mrs Johns' case not only had a real prospect of success, but that the employer would have no defence.

25. Both of these cases are on very different facts. *Derby* supports the proposition that one should not shut one's eyes to the possibility that an appeal on a relevant issue may succeed, but it does not say the court is bound to act as TTL says it should. *Johns* emphasises the importance of not reaching a conclusion based on speculation about the outcome of other litigation. Neither deals with this factual situation, where the appeal in question is in the same litigation and the defendant is in materially the same position as the other defendants, and in particular neither case supports the argument that a real prospect of success of an appeal on the question whether there is a serious issue to be tried amounts to a conclusion on the different question of whether there is in fact a serious issue to be tried on the underlying claim.

26. In circumstances where neither party is relying on any relevant difference between Mr Ver and the other defendants, and nor are they seeking to take any other substantive points – in particular TTL is not arguing at this stage that this court should depart from the March Judgment – then, while I am not ignoring that permission to appeal has been granted, I see no sufficiently good reason not to follow my own previous decision and grant Mr Ver's application.

27. As to Mr Friedman's point that that decision really forces an appeal to the Court of Appeal when a refusal of the application would not, I disagree. In reality there would be an appeal in either event.

Extending time for appeal

28. I shall deal very briefly with the third alternative, which was extending time for the Appellant's notice. I have really covered that already in considering whether to delay handing down judgment. Case management is for the Court of Appeal. I should not preclude the possibility of Mr Ver participating in an appeal by my actions, and should not stand in the way of the Court of Appeal making its own decision as to whether it is appropriate to hear the appeals together.

(After further submissions)

Costs

29. As to costs, Mr Ver seeks a summary assessment of his costs of the application. He accepts that his costs of the claim should be subject to detailed assessment but seeks a payment on account. TTL accepts the principle of a costs award against it but says there should be a detailed assessment of the costs of both the claim and the application, that the payment on account should be much lower than sought by Mr Ver and that any payment on account should go into an escrow.

30. As to the question of summary assessment, I have concluded that the costs of both the claim and the application should be subject to detailed assessment. I note that the costs

of the application as claimed, at around £129,000, are very high in relation to the costs of the claim, at around £63,000. Although I have a costs schedule in relation to the application confirming that the £129,000-odd of costs claimed do relate to it, there clearly has been very significant overlap in the work, and the distinction between the claim and application is somewhat artificial in my view. There are also some legitimate questions that have been raised by TTL in relation to the very substantial counsel's fees claimed in relation to the application, which, excluding today's hearing, exceed £60,000.

31. As to the question of interim payment, which obviously now relates both to the costs of the claim and the costs of the application (and I appreciate I have not specifically heard from Mr Charlton on the question of interim payment in respect of the costs of the application), I regard the 80 per cent of the claimed costs sought in respect of the costs of the claim as extremely high.

32. Mr Friedman pointed me to the summary in the White Book, section 44.2.12, as to the matters that should be taken into account in determining a payment on account. I take account of all relevant factors including the likelihood of Mr Ver being awarded the costs he seeks, or a lesser amount and, if so, what proportion of those, the difficulty, if any, 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 overpayment.

33. The figure I have in mind is much nearer to 50 per cent than 80 per cent. I want to come back to the precise number when I have heard from Mr Charlton again in relation to payment on account in relation to the costs of the application, because I think the right thing to do is to award a single figure, but I am currently minded to award much closer to 50 per cent, taking account of the factors to which I have just referred.

34. In relation to whether the payment should go into escrow, Mr Friedman made some fairly strong submissions that it should, in particular pointing to the fact that not even Mr Ver's instructing solicitors appear to know with certainty where he is. He points to the high degree of personal animosity and the risk of inability to obtain recovery, pointing fairly to the fact that although Mr Ver has paid a previous costs order, that was very limited, £9,000, and in the circumstances that TTL is concerned about, where they have succeeded on an appeal, the total amounts involved could be substantially larger.

35. Nevertheless, I am overall minded to conclude that an escrow account is not the right way forward, and rather it is preferable to take account of the risk of non-recovery in determining the level of payment on account. In reaching that conclusion, my starting point has to be the CPR rule that, unless there is a good reason to do otherwise, I should order payment of a reasonable sum on account of costs.

36. Regarding the respective means of the parties, the fact that Mr Ver may be very well off does not seem to be determinative. In principle, the starting point is that he is

entitled to a payment on account. Further, it was TTL's choice to sue Mr Ver in this jurisdiction. It presumably must have taken into account the prospects of enforcement in deciding to do so. It seems to me that, overall, an escrow is an unnecessary additional complication that will lead to further questions about what happens to that escrow amount if and when the Court of Appeal issue their decision.

37. The point of a payment on account is to provide the successful party with some amount to allow them to reimburse their costs immediately and not await detailed assessment. Whilst I understand TTL's concerns, it seems to me that the right approach is to order a relatively modest payment on account.

(After further submissions)

38. I think the right way to proceed is a payment on account of £95,000, which represents, very roughly, 50 per cent. It is not particularly relevant but, if a breakdown is required between the application and claim, I have allowed £30,000 in respect of the claim and the balance, £65,000, in respect of the application.

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This transcript has been approved by the Judge