Neutral Citation Number: [2019] EWHC 69 (Comm)

Case No: CL-2012-000478

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

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

Date: 21/01/2019

Before :

Andrew Henshaw QC (sitting as a Judge of the High Court)

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Between :

JSC VTB BANK **(a company incorporated in Russia)**	**Claimant**
- and –	
(1) PAVEL VALERJEVICH SKURIKHIN **(2) PIKEVILLE INVESTMENTS LLP** **(3) PERCHWELL HOLDINGS LLP**	**Defendants**
- and –	
(1) ZENO ALOIS MEIER **(2) BEAT LERCH** **(3) CROWN CAPITAL HOLDINGS LIMITED** **(4) THE BERENGER FOUNDATION**	**Respondents**

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Tim Matthewson (instructed by **PCB Litigation LLP**) for the **Claimant**
David Lord QC and Sebastian Kokelaar (instructed by **Withers LLP**) for the **Fourth Respondent**
The Defendants and the First to Third Respondents did not appear and were not represented

Written submissions received 18, 21, 26 and 28 December 2018

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Approved Judgment

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Mr Andrew Henshaw QC :

1. By a judgment handed down on 13 November 2018 I dismissed an application by the Claimant ("***VTB***") for security for its costs in respect of an application by the Fourth Respondent ("***Berenger***") issued on 12 July 2018 to discharge the order made on 21 July 2015 appointing receivers by way of equitable execution over the membership shares and interests in the Second Defendant ("***the Discharge Application***"). The Discharge Application is listed for hearing on 23 and 24 January 2019. VTB and Berenger agreed that I should deal with the costs of the security application on the papers, and have filed written submissions accordingly.

2. Berenger submits that costs should follow the event in the ordinary way, and that it should recover its costs of the security application (originally put at £35,029.50) together with, now, its subsequent costs of resisting VTB's submissions that costs should be reserved and/or payment of costs deferred. Berenger's total costs claim is now £41,204.50.

3. VTB submits that:

    i) the costs of the security application should be reserved to the judge hearing the Discharge Application;

    ii) alternatively, if the Court is minded to make an order for costs in favour of Berenger at this stage, the time for payment of any costs award should be deferred until after the determination of the Discharge Application, and the amount of any costs awarded should be no more than £11,125.70.

4. VTB says both its primary and alternative proposals will ensure that it is not required to pay to Berenger the costs of the security application until after the determination of the Discharge Application. That will preserve the possibility of a set-off between the costs of the Discharge Application and the costs of the security application under CPR 44.12. VTB submits that this would be fair and just in circumstances where:

    i) the costs of the Discharge Application will comfortably exceed the costs of the security application;

    ii) there is strong evidence that Berenger, a Liechtenstein foundation, will be unable to pay VTB's costs of the Discharge Application if ordered to do so. It was said in Berenger's witness statements that the reason Berenger did not take part in the hearing of 13 July 2015 was that it did not have sufficient resources at that time to instruct English solicitors and counsel, and that it has only been able to bring the Discharge Application now because funds have been made available by a beneficiary of the foundation's trust;

    iii) VTB has good prospects of success in the Discharge Application, bearing in mind that in my judgment dismissing the security application I recognised that: "*there are grounds for doubt about Berenger's approach to the litigation and the merits of the Discharge Application*";

iv) there will be no or no material delay in the making and/or payment of any costs award. An order for payment of the costs of the security application within 14 days would (now) require payment at some time around the end of this month, January 2019; whereas the hearing of the Discharge Application is listed for 23 and 24 January 2019; and

v) there is no evidence that Berenger would be prejudiced by preserving the possibility of a set-off. On the other hand, VTB would be seriously prejudiced if required to pay Berenger's costs of the security application before the determination of the Discharge Application.

5. VTB thus invites the court to exercise:

i) its general case management power to adjourn the issue to a later hearing;

ii) its power under CPR 83.7(4)(a) to stay the execution of a judgment or order for the payment of money *"[i]f the court is satisfied that ... there are special circumstances which render it inexpedient to enforce the judgment or order"*; or

iii) its general discretion under CPR 44.2(1)(c) as to when costs are to be paid.

6. VTB's primary contention is that the issue should be deferred to the judge hearing the Discharge Application, because (a) one of the grounds on which VTB (ultimately) sought security was abuse of process by Berenger; (b) whilst not concluding that Berenger was guilty of abuse of process I expressed some scepticism about its conduct of the litigation and expressly did not pre-empt any findings that may be made on the Discharge Application; and (c) the judge hearing the Discharge Application will need to decide, on the basis of the more extensive evidence that will be before him/her, whether or not Berenger's approach does in fact amount to an abuse of process. VTB submits that the findings by the judge on that issue at the hearing of the Discharge Application will determine whether or not it is appropriate for Berenger to have its costs of the security application.

7. VTB also points out that Males J at a subsequent hearing on 11 December 2018 dealing with directions and disclosure ordered (albeit by agreement) that the costs of that hearing be reserved to the judge hearing the Discharge Application.

8. Tempting as it may be to postpone the issue in this way, particularly in circumstances where the hearing (though not necessarily the determination) of the Discharge Application is imminent, I do not consider that it would be correct.

9. First, as Berenger points out, VTB's application was originally made under CPR 25.12, under which I concluded that I had no power to order security against Berenger because it was not in the position of a claimant in the proceedings. It was only at the last minute, in VTB's skeleton argument, that it added an alternative basis for an order of security, viz that Berenger was abusing the process of the court.

10. Secondly, and more generally, the security application was advanced, and had to be determined, on the basis of the evidence and arguments presented on the application.

The possibility that it might subsequently be held, following the hearing of the Discharge Application itself, that VTB would with hindsight have had good grounds on which to obtain an order for security is not, in my view, a reason for postponing the determination of the costs arising from the security application.

11. Thirdly, I do not know on what basis the parties agreed that the costs of the hearing before Males J should be reserved. However, the security application was in my view a discrete matter, the costs of which should follow the event.

12. Turning to the power to stay execution under CPR 83.7(4), Andrew Smith J in *Dar Al Arkan Real Estate Company and Another v Al Refai* [2015] EWHC 1793, [2016] 6 Costs LO 865 applied the guidance given by Bingham LJ in *Burnet v Francis Industries Plc* [1987] 1 WLR 802. Andrew Smith J noted that Bingham LJ had described an order for a stay as being "*unusual*" and had said the requirement of special circumstances is strictly insisted upon (at p811C).

13. Andrew Smith J set out the considerations identified by Bingham LJ in *Burnet* (at 811D-H) that were relevant to the decision whether or not a stay should be ordered on the basis of a cross-claim, including:

    i) the nature of the claim giving rise to the judgment in respect of which a stay is sought;

    ii) the relationship (if any) between the claim giving rise to the judgment and the cross-claim;

    iii) the strength of the cross-claim;

    iv) the size of the cross-claim (a consideration which Bingham LJ thought would be rarely, if ever, decisive);

    v) the likely delay before the cross-claim is determined;

    vi) the prejudice to the judgment creditor if a stay is granted; and

    vii) the risk of prejudice to the party making the cross-claim if a stay is refused.

14. In the present case, there is at present (unlike in *Dar Al Arkan*) no actual cross-claim, but only VTB's contingent claim against Berenger for costs in the event that Berenger is unsuccessful in the Discharge Application. For present purposes I would be willing to accept VTB's contentions that that contingent claim, if it arises, would be likely to be larger than Berenger's current claim for costs; and that VTB has at least an arguable case on the merits on the Discharge Application. The cross-claim would be linked to Berenger's current costs claim in the sense of arising from the same proceedings. As to delay and prejudice to Berenger, there would be some likely delay since it seems probable that the judgment on the Discharge Application will be reserved, therefore Berenger would suffer some delay in recovering its costs.

15. There is potential prejudice to VTB if it has to pay Berenger's costs now, because there are reasonable grounds for doubt about whether any subsequent costs order in VTB's favour would be recoverable absent an ability to offset. That is, though, in essence the

same category of prejudice in respect of which I concluded the court did not have power to order security. It is arguable that the position now is different, in that the court does have power to stay execution of its costs order (or to direct a later payment date under CPR 44.2) and to that extent in effect to provide some security to VTB for its contingent costs claim. However, the same broader considerations as underlay my judgment on the security application still apply. Berenger is not, in relation to the Discharge Application, properly to be regarded as being in the position of a claimant, and has not (at least so far) been shown to be abusing the court's process by making that application. In those circumstances, I do not consider it appropriate to make an order which, by delaying payment to Berenger of the costs of its successful defence of the security application, would in substance provide VTB with partial security for its costs of the Discharge Application.

16. For those reasons, I do not consider it appropriate to stay execution under CPR 83.7(4). In my view, the same considerations also make it inappropriate to direct a later date for payment of Berenger's costs pursuant to CPR 44.2. To do so would in substance amount to a grant of security for costs against a non-claimant in circumstances where such an order would be unjustifiable.

17. Finally, I have considered carefully the parties' submissions about the amount of costs claimed. Berenger originally claimed £35,029 for the costs of the security application, compared to VTB's claimed costs of £27,861. VTB appeared by junior counsel with one solicitor in attendance, whereas Berenger used both leading and junior counsel with two solicitors present. Berenger now seeks a total of £41,204.50 including its costs of the current issues about costs.

18. VTB makes the point that as the amount of security sought was £120,000, it was unjustifiable for Berenger to instruct leading counsel, or at least to seek to recover the costs of doing so *inter partes*. As will be evident from my 13 November 2018 judgment, the legal issues were more complex than is usual for a security application, and the hearing took almost a full day. In the circumstances I do not consider it was inappropriate for Berenger to use leading counsel, though it was perhaps borderline given the amount of security in dispute. Whether instructing both leading and junior counsel was justifiable is more debatable, and I consider some discount on the overall figure to be justifiable. Similarly, I do not think it reasonable for Berenger to recover the costs of two solicitors in attendance at the hearing, but would accept that it can reasonably recover the costs corresponding to the more senior solicitor's attendance. Further, I consider Berenger's subsequent costs in dealing with the current issues to be disproportionately high. I do not, on the other hand, see any real force in VTB's complaints about solicitors' hourly rates or the costs of preparing bundles and the statement of costs.

19. Taking all matters into account, I summarily assess Berenger's costs of the security application (including the subsequent costs issues) at £31,000, to be paid within 21 days.