Neutral Citation Number: [2023] EWHC 985 (Comm)

Case No: CL-2022-000075

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: 28/04/2023

Before :

Simon Rainey K.C. (sitting as a Judge of the High Court)

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Between :

(1) PRASHANT HASMUKH MANEK **(2) SANJAY CHANDI** **(3) EAGM VENTURES (INDIA) PRIVATE LIMITED**	**Claimants**
- and –	
(1) 360 ONE WAM LIMITED (formerly known as IIFL WEALTH MANAGEMENT LIMITED) **(2) 360 ONE ASSET MANAGEMENT (MAURITIUS) LIMITED (formerly known as IIFL ASSET MANAGEMENT (MAURITIUS) LIMITED** **(3) 360 ONE CAPITAL PTE LTD (formerly known as IIFL CAPITAL PTE LTD)**	**Defendants**

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Rajesh Pillai K.C., William Day and Rishab Gupta (instructed by **Howard Kennedy**) for the **Applicants / Defendants**
Anna Dilnot K.C. and Joshua Crow (instructed by **Cleary Gottlieb**) for the **Respondents / Claimants**

Hearing dates: 17th March 2023

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JUDGMENT

(CONSEQUENTIALS)

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 11:00 on Friday 28th April 2023

Simon Rainey KC :

1. This judgment addresses consequential matters arising out of my Judgment dated 30th March 2023, [2023] EWHC 710 (Comm), by which I dismissed the Defendants' application to set aside the order of Foxton J dated 7 June 2022 granting *ex parte* permission to the Claimants to serve the New Proceedings on the Defendants out of the jurisdiction.

2. I refer to that Judgment and adopt the same abbreviations etc. I also refer to the Court's Order dated 30th March 2023.

Costs

3. The Claimants seek (a) costs of the application and of the hearing in the sum of £195,107.00 (excluding VAT), together with (b) additional costs of £14,137.50 (excluding VAT) in respect of dealing with post-judgment and consequential submissions.

4. No submissions have been made as to (b), and these costs are in my view proportionate and reasonable and I summarily assess them in the sum claimed plus VAT.

5. As to (a), the Defendants contend that the level of costs sought is excessive and should be reduced to about 60% of the figure claimed, i.e. to some £125,000 (inclusive of VAT).

6. Standing back, the Defendants' application, while disposed of in a one day hearing due to the economic and efficient way in which it was argued by both Counsel, nevertheless raised a large of number of issues and gave rise to a very extensive body of supporting documentation, both in the form of witness statements and exhibits. I note that the Defendants' costs were £651,027.98 (exclusive of VAT), with solicitor hours charged at £349,995.00 of which £178,041.00 was work on documents. Just balancing the respective costs levels and while of course taking account of the fact that, as the applicant, the Defendants would have carried a larger proportion of the work in formulating the application, its grounds and supporting materials, than the Claimants as respondent, there is no obvious or glaring disparity in costs levels which would suggest that the Claimants' costs are *per se* unreasonable or disproportionate.

7. Against that background, the Defendants make two points.

8. First, it is submitted that the hours spent by the Claimants' solicitors Cleary Gottlieb are excessive for a one-day jurisdiction challenge. I dismiss this submission.

9. The main individual criticisms relied upon are, first, that a total of 50 hours were spent on the preparation of the second witness statement of Mr Gadhia. Given that this was the principal response statement of the Claimants and dealt in detail with the various factual matters relied on by the Defendants and itself was 30 pages in length and marshalled over 500 pages of exhibits, this criticism lacks reality. I note that of the 50 hours, 35.75 hours were incurred by a Grade C fee earner and only 9.25 hours by the Grade A fee earner. This seems to me to be a perfectly reasonable and proportionate

number of hours. Secondly, a total of 17 hours is complained of as having been spent (15.25, Grade C; 2.5 Grade A) on the first witness statement of Mr Manek. Again, when I consider what that statement covered and, additionally, when I compare equivalent times for witness statements prepared by the Defendants, this seems both reasonable and efficient.

10. Lesser criticisms are that 7.25 hours was spent by Cleary Gottlieb on the Skeleton Argument. While this would be the principal burden of Counsel, it is unrealistic to consider on an application of this kind that solicitors would not also be heavily involved in the review of the Skeleton and its drafts; cf. the Defendants with their comparable time of 4.8 hours. Lastly, reliance is placed on 8.5 hours having been spent in generic "hearing preparation". Given the volume of material and the large number of issues that figure is unsurprising.

11. Secondly, objection is taken to the hourly rates claimed for and as charged by Cleary Gottlieb on the basis that these are far in excess of the Guideline Rates for Grades A, C and D fee earners (with the first two being 88% and 117% higher respectively). This submission has force.

12. The Court of Appeal has stressed in a number of recent decisions that, in the case of solicitors' fees, if a rate in excess of the guideline rate is to be charged to the paying party, a clear and compelling justification must be provided: see e.g. *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 and *Athena Capital Fund SICAV-FIS SCA v Secretariat of State for the Holy See* (*Costs*) [2022] EWCA Civ 1061. The sorts of justifications which might apply are set out in PD44SC, para. 29.

13. The justification put forward by the Claimants is that the case is complex and that the litigation is substantial and of high value, involving an alleged international fraud (Consequentials Skeleton No. 1, para. 5(3)(b)) and that the overall level of costs (dealt with by me above) shows that the Claimants conducted the litigation economically and efficiently in terms of partner time when compared with the Defendants (ibid., para.. 5(3)(c) and Consequentials Skeleton No. 2, para. 2).

14. The latter point goes to numbers of hours claimed and does not address nor could it justify claiming rates substantially in excess of the Guideline Rates.

15. The other points relied upon in justification of the rates are, with respect, generic and could be made equally in many other jurisdiction challenges involving fraud, and involving much higher claim values.

16. I bear in mind that the updated Guideline Rates are meant to reflect heavy and complex Commercial Court and Chancery Division litigation. As it was put by Birss LJ in *Athena Capital* (supra) at [10]:

> "In my experience there has been a view that the previous set of Guideline Hourly Rates (before 2021) were not directed to the heaviest work such as takes place in the Business and Property Courts. In part no doubt this was because they were so out of date. Whatever the position was or was thought to be, it changed in the current set of Guideline Hourly Rates, which were approved by the Master of the Rolls in August 2021. As my Lord pointed out in Samsung v LG, the current set

> includes a band called "London 1" which is a set of rates directed expressly to very heavy commercial and corporate work by centrally London based firms. I would add that the London 1 rates band in the current Guideline Hourly Rates is based on evidence from the Business and Property Courts themselves (see the Civil Justice Council's Final Report of April 2021). Therefore the London 1 band is directly applicable to this case and so a justification for the much higher rates was needed"

17. I note too that by comparison and handling the same litigation, the Defendants' hourly rates are only slightly higher than the Guideline Rates.

18. I do not consider that any real justification or special reason has been made out by the Claimants for allowing the recovery of costs from the Defendants at a level so far above the Guideline Rates.

19. Costs will therefore be summarily assessed on the basis of the hours claimed but only at the Guideline Rates.

20. I do not consider that any further discount is appropriate.

21. I therefore summarily assess the Claimants' costs on the basis claimed, save for the application of the Guideline Rates for Grades A, C and D, together with VAT. The parties are invited to agree the appropriate figure produced by my assessment.

Permission to Appeal

22. The Defendants seek permission to appeal from my judgment and order on four grounds.

23. *Ground 1* concerns my decision that, pursuant to Rome II, the Claimants had a good arguable case that the relevant law was English and not Indian law.

24. This raised, first, the application of Article 4(1) of Rome II and consideration of the place where the damage occurred. I have held that this was not India (as the Defendants contended based on the registration of the shares in GIR's name having taken place there) but was England (no one contending for the UAE or Kenya) as the place where the Claimants became committed to accepting the transaction by which they were divested of their shares. Accordingly the relevant law to be applied was English law.

25. I regard the Defendants as having no realistic prospect of success in establishing that this decision was wrong. First, it represented the straightforward application of the Article 4(1) test to the particular facts of the present case, where all that the Claimants had to show was a good arguable case that the relevant law was English law. Secondly, the Defendants bore the heavy burden of establishing that the only permissible finding was that the place of the damage was India, in circumstances where all that was relied upon was the final formal act in relation to the share register. That was highly artificial. Thirdly, the Defendants' case also gave no recognition to the more realistic approach taken in the cases referred to in paragraph [33]. The Defendants' submissions on Article 4(1) were thin and unpersuasive.

26. As to my decision on the Claimants' alternative case based on Article 4(3) and the centre of gravity of the torts alleged, given my refusal of permission to appeal my Article 4(1) ruling, it does not arise.

27. If it did, I would similarly refuse permission since any challenge as to my conclusion on Article 4(3) would also have no realistic prospect of success. As before, my decision involved a factual assessment of where the centre of gravity of the torts alleged was, looking at all the circumstances of the case and focussing on where the critical events making up the torts took place: *Avonwick Holdings v Azitio* [2020] EWHC 1844 (Comm), in the context of whether the Claimant could make out a good arguable case for England or whether the only possibly arguable result was India. The factors pointing to India were weak (or at least arguably weak) and ignored any focus on the critical elements of the commission of the alleged torts (see [49]). No error of principle was made: see [45]. Professor Rogerson's views expressed in another context take matters no further.

28. *Ground 2* concerns Article 12 of Rome II. No argument was advanced by the Defendants on this basis, the Defendants merely reserving their position, given the existing case law at first instance: see their Skeleton Argument at footnote 11. I see no basis for suggesting that the uniform case law collected together in Dicey & Morris, as referred to, is arguably wrong.

29. *Ground 3* concerns my application of the section 32 Limitation Act 1980 test and my decision that the Claimants had a good arguable case that they could not with reasonable diligence have discovered the participation of the IIFL Defendants in the torts complained of before 16th February 2016.

30. The principal ground relied upon is that the Court erred in law since it reversed (or effectively reversed) the burden of proof (see Skeleton, para. 9). This is unarguable: see Judgment [52]; [69]; [70].

31. Further, on the facts, the Defendants' case on the application that the wider involvement of the IIFL Defendants in the torts as well as the torts themselves and the original claims all could and should unarguably have been made by the Claimants in the very narrow window before 16th February 2016 was always an unreal one. The Claimants clearly on the facts before the Court established (at the very least) a realistic prospect of success that they could and should not have discovered that wider involvement before that date.

32. Ground 3 therefore has no realistic prospect of success.

33. *Ground 4* relates to my finding that, while the tort of intimidation is an overt tort, the Claimants had a good arguable case that the fact of the commission of that overt act by Mr Shah *acting for* the IIFL Defendants was concealed, putting them within section 32(1)(b). It is argued by the Defendants that the Claimants had no arguable basis for contending that that fact was concealed. If the involvement of the IIFL Defendants was concealed and could not be discovered, it necessarily (or arguably necessarily) was: see [93].

34. I therefore refuse permission to appeal.

Consequential Directions

35. The Claimants contend that the action should now proceed. The Defendants contend that the action should be paused, both in terms of service of an acknowledgment of service and service of their Defence to await a possible granting of permission to appeal by the Court of Appeal and that Court, on such an appeal, holding that the Court does not have jurisdiction over the IIFL Defendants.

36. In the exercise of my discretion I unhesitatingly reject the Defendants' approach.

37. Both in my Judgment and in my reasons for refusing permission to appeal, I have considered that the Defendants' case that the Claimants cannot establish a realistic prospect of success that the Court has jurisdiction (despite being well argued by Mr Pillai KC) was weak and rested ultimately on a series of strained and difficult propositions. While the Court of Appeal on any renewed application for permission may disagree, in terms of the future case management of the litigation following my ruling on jurisdiction, my view as to the insubstantial merits of the Defendants' jurisdictional arguments is relevant to the exercise of my discretion as to the way forward in the action.

38. There is no good reason for the service of the Defendants' Defence in the action to be delayed or deferred. It would occasion much prejudice to the Claimants in terms of delay to the Existing and the New Proceedings, where it is unlikely that any appeal will actually ever take place.

39. Further, the procedure adopted by the Court in *Conversant Wireless Licensing v Huawei Technologies* [2018] EWHC 1216 (Ch) adequately protects the Defendants from any submission to the jurisdiction pending the disposal of any renewed permission to appeal application (and appeal if any) by deferring service of the acknowledgment of service and ordering that the service of the Defence is without prejudice to such application / appeal and is not a submission to the jurisdiction.

40. Accordingly, I will adopt the "practical compromise" proposed by the Defendants as a fall-back position, subject however to one matter.

41. This is the time to be allowed by the Court to the Defendants for the service of their Defence. The Defendants seek a date of 28th July 2023. This is unrealistic and unnecessary. It is plain from the very extensive consideration given by the Defendants to the Claimants' claim (as shown by the high level of costs already incurred) that the matters alleged by the Claimants have been investigated in detail by the Defendants.

42. The Claimants are prepared to extend time for service of the Defence to 25th May 2023. In my view that is generous, as the Defendants should be perfectly able to serve a proper Defence within 4 weeks. However, given that this is what is offered, this compromise is adopted. Given the grant of this generous extended period, any further extension of time (if it were to be sought) is very unlikely to be granted by the Court.

43. I invite the parties to draw up an agreed form of Order, giving effect to what I have decided above as to the timetable.