

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

Claim No: BVIHC (COM) 2018/0067

BETWEEN:

VTB BANK (PUBLIC JOINT STOCK COMPANY)

Claimant

and

[1] MICCROS GROUP LTD

[2] TAURUS LTD

Defendants

Decided on paper on written submissions:

Mr. Tim Penny QC and Mr. Brian Lacy of Ogier for the claimant

Mr. David Lord QC, Mr. Sebastian Kokelaar and Ms. Sara-Jane Knock of Withers
BVI for the second defendant

The first defendant did not make submissions

2020 June 4

JUDGMENT ON COSTS

[1] **JACK, J [Ag.]**: Following the handing-down of my judgment of 23rd January 2020, in which I refused to extend the interim receivership of the single share of Miccos Group Ltd, there were extensive discussions between the parties as to the consequential order which I should make. These resulted in a detailed agreed

order which contained many detailed recitals and undertakings. It covered six pages. I approved it on 28th April 2020.

[2] One of the terms of the order was:

“4. All issues relating to the costs of and occasioned by the Interim Receivership Order (including the Interim Payment Application) shall be determined by the Court on paper, with the following directions applying:

4.1 The parties shall file and serve skeleton arguments on these issues by 8 May 2020.

4.2 The parties shall file any responsive skeleton arguments on these issues by 15 May 2020.”

The Interim Payment Application was an application issued by Taurus on 15th April 2020 seeking a payment on account of any costs awarded to it.

[3] Shortly before agreeing to make that order, I made the following observation in my third judgment in the case of **Pacific Fertility Institutes Holding Co Ltd v Pacific Fertility Institutes Holding (HK) Co Ltd**:¹

“[3] This third judgment concerns the costs of and in the costs assessment, which was the subject of the second judgment. The background to the second judgment is this. The parties considered that a paper determination of the costs might save costs and were agreed that the detailed assessment of the applicant’s costs of the substantive application should be considered on paper. I acceded to that joint request. There has been discussion, for example most recently in the Commercial Court Users’ Group, as to whether costs could be saved by doing detailed assessments on paper.

[4] The facts of this case show that paper determinations of costs do not save costs. Instead the costs are very considerably increased.”

[4] That conclusion is borne out by the current case, where what would normally be the subject of fairly short oral submissions, have been replaced by substantial skeleton arguments with substantial bundles. Nonetheless, I acceded to the form

¹ BVIHC (COM) 142 of 2019 (decided 30th March 2020).

of the draft order submitted, given the obvious difficulties which the parties had had in agreeing it at all and the fact that the third **Pacific Fertility** judgment had only recently been posted to the EC Courts web-site. It is, however, important that the written determination of costs does not turn into an outdoor relief scheme for lawyers. Tortola is very distant from Speenhamland in Berkshire.

The issues and the law

[5] There are two questions for determination: what order should I make as to the incidence of costs of the claimant's application for the appointment of interim equitable receivers? And what, if any, order for payment should I make and on what terms? I shall use the same shortened forms of names as in the main judgment.

[6] The relevant Civil Procedure Rules are these:

"64.6(1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

...

(5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(6) In particular it must have regard to—

(a) the conduct of the parties both before and during the proceedings;

(b) the manner in which a party has pursued—

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to—

(i) pursue a particular allegation; and/or

(ii) raise a particular issue; and

(e) whether the claimant gave reasonable notice of intention to issue a claim

...
69B.11(1) Rule 65.11(1) shall not apply in commercial matters.

(2) The court will, after giving its decision on an ordinary application, determine, either forthwith or at a hearing fixed for the purpose,
(a) which (if any) party should pay costs to another party; and
(b) how much in principle (taking into account the provisions of rule 64.6 and any other matter appearing to the court to be relevant in all the circumstances) of the costs of the party to be paid ('the receiving party') are to be paid by the paying party.

...
(4) If the hearing of an application has occupied the time of the court for one hearing day or less, the court will summarily assess the quantum of such costs forthwith after giving its determination under paragraph (2). In other cases the court may either fix a hearing for the assessment to be carried out by the Commercial Court Judge or may direct that the quantum be assessed by the Master (or such other officer of the court as may from time to time be charged with making such assessment).

(5) Where after the hearing of an ordinary application the court orders one party to pay costs to another party, those costs shall, unless the court otherwise orders, be paid within 14 days of the making of the order or the final determination of any assessment, as the case may be."

The first question

[7] I turn to the first question. Taurus' submission is simple: they won the application, so they should get the costs. VTB say I should take a more nuanced approach, looking at the particular issues. They accept that Taurus is the successful party. However, they say that they have won on various important matters. In accordance with CPR 64.6(5) and (6) and especially CPR 64.6(6)(c), the appropriate order should be no order for costs, because balancing the issues on which VTB won against the issues on which Taurus won, effectively the parties come out evenly. Alternatively, the costs of the interim receivership application should be costs in the case.

[8] My starting point is that Taurus are the successful party on the application. I remind myself that the main judgment could have stopped at para [10]. At that point, I concluded that receivership was fundamentally the wrong procedure to

adopt. VTB should have applied for a provisional charging order with a limited freezing injunction to prevent interference with the Pikeville administration.

[9] Now in fact I did not leave the matter there, in deference to the detailed arguments I had heard and in case of an appeal being brought. Nonetheless, the period of 30th May 2018, when Wallbank J appointed interim receivers, to 23rd January 2020, when I discharged the order, was time almost completely wasted. Likewise the costs incurred in that period were largely wasted.

[10] In relation to the issues, VTB submit that they won on the issues of good arguable case, risk of dissipation and admissibility of the English judgments. This is true, but does not go to the crux of the reason for their losing. I was not taken to any case law on the test to be applied when granting a provisional charging order. CPR 48.3(2)(d) merely requires the evidence of the judgment creditor to “state that to the best of the deponent’s information and belief the debtor is beneficially entitled to the stock or personal property as the case may be.” That is a low test, certainly much lower than “a good arguable case”.

[11] It is true that the Court has a discretion whether to grant a provisional charging order, but it is a judicial discretion. There are three main grounds for refusal: (a) granting a charging order would prejudice other creditors of the judgment debtor; (b) the smallness of the judgment debt makes the grant of the order oppressive; and (c) the application is obviously misconceived, because the judgment debtor has no legal or equitable title to the asset against which the charging order is sought. This last category will be rare. The Court will generally have little information about the ownership of the assets and CPR 48.3(2)(d) does not require the judgment creditor to adduce evidence of ownership. The time when the question of ownership will be determined is when the judgment creditor seeks to make the provisional charging order final.

[12] Because the Court decides the grant of a provisional charging order on an assertion of the judgment debtor’s information and belief, the admissibility or

otherwise of the Butcher and Robertson judgments is irrelevant. Likewise, when the Court decides whether or not to grant a charging order, whether provisional or final, the risk of dissipation is irrelevant.

[13] It is true that the grant of a freezing order requires the judgment creditor to establish a good arguable case. However, to get the injunction it sufficed for VTB to show a good arguable case that either Berenger or Eastbridge had some beneficial interest in the sole share in Miccross. Whether Taurus would have mounted a thoroughgoing attack on that issue, if VTB had merely sought the injunction as an ancillary form of relief to its claim to a provisional charging order, is necessarily speculative. However, it may well have been that Taurus would have waited for the return date on the charging order rather than incur the substantial costs of making a separate application to discharge the injunction on its own. If that is right, then VTB's argument that they are entitled to the costs of establishing a good arguable case on the beneficial ownership of Taurus largely goes.

[14] Standing back and looking at these matters in the round, in my judgment VTB should pay Taurus the costs of the interim receivership application. Looked at overall, this is not an appropriate case for an issues-based costs order. VTB adopted fundamentally the wrong procedure; they have caused a lot of unnecessary costs to be incurred; there is no injustice in ordering them to pay the costs. The costs of the ancillary application should follow the order on the main application.

The second question

[15] I turn then to the second question. Taurus have served a schedule of costs amounting to \$533,361.12. (All sums are US dollars.) The hearing lasted two days, so the presumption is against summarily assessing the costs. In any event VTB have raised issues about particular matters in the schedule, such as the overlap with costs the subject of an order of Wallbank J dated 27th November

2019, which provided for no order for costs in relation to the application before him. These matters would require consideration on a detailed assessment.

[16] In these circumstances, it would be usual to consider whether to order that an interim payment on account should be made. Before doing so, however, I need to consider the practical implications of ordering that a payment on account be made. VTB's position is that any money passing to Taurus will effectively go into a black hole. Obviously, if VTB lose at the trial on the issue as to whether the provisional charging order be made final, the point does not arise: VTB are likely to be having to pay a substantial sum of costs to Taurus. However, if VTB win at trial, they may face difficulties enforcing any costs order in their favour, since Taurus have no assets other than the Miccos share. VTB submit that any costs order should only be enforced after the trial, so that they can off-set the costs of the current application against any costs order in their favour at trial.

[17] Taurus do not really dispute that any sums paid will disappear. Indeed, they rely on the fact that they are under financial pressure in funding the litigation. In their skeleton (para 22) they assert that they are "reliant on funding from one of the beneficiaries of the Olympic Settlement (a private individual) to conduct this litigation." For this reason, they want a payment to themselves, rather than into Court, so that their cash-flow is assisted. Realistically, however, they accept that there should be some mechanism for securing VTB's position. The proposed mechanism (para 24) is that any sums paid "only be used for purpose of paying legal costs incurred in connection with these proceedings."

[18] I agree with Taurus that VTB's position should be protected to some extent. The method proposed by Taurus, however, provides virtually no protection at all. Even if Taurus were currently completely up-to-date with their lawyers' fees (as to which there is no evidence), any sums paid over by VTB will almost certainly be used up in full before the charging order issue comes to trial. There will be nothing left to meet any costs order in VTB's favour.

- [19] It seems to me that any order for payment of interim costs should be on the basis that Taurus provide some security for repayment, in the event that a costs order is subsequently made against Taurus in favour of VTB. It does not seem to me that the security needs to be particularly onerous. In particular, requiring a bank guarantee may be oppressive and defeat the object of making a payment on account. A personal guarantee given by the individual beneficiary of Olympic who is the litigation funder may be sufficient. However, I will give the parties an opportunity to consider the form of security which should be given.
- [20] On the basis that security can be given, I turn to the amount of the interim costs order. VTB say that the \$533,000 odd is “an eye-watering sum for a 2-day interim application” and that it was disproportionate, when employing an English silk, to instruct English junior counsel as well as BVI counsel. They submit that, if (contrary to their main submissions) an order should be made, it should be in the sum of \$150,000.
- [21] In my judgment, describing the bill of costs as being for a 2-day hearing is not fair. It covers most of the work from the grant of the interim receivership in May 2018. Likewise, it was not unreasonable to instruct English junior counsel. As often happens in litigation in this Territory, local counsel effectively acted as the instructing solicitor.
- [22] Taurus submit that \$320,000 would be an appropriate figure for an interim costs award. In my judgment, that is a little high and does not take into account the detailed criticisms made by VTB. In my judgment the sum of \$275,000 is appropriate. That is the sum which I shall order.

Conclusion

- [23] Accordingly, I order that VTB pay Taurus’ costs of the interim receivership application and the application for a payment on account to be the subject of a detailed assessment after trial or further order, if not agreed. I order that VTB make an interim payment on account of those costs in the sum of \$275,000,

provided always that Taurus do provide security for such sum on such terms as the Court shall fix in default of agreement by the parties.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar