Neutral Citation Number: [2021] EWHC 580 (Ch)

Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 12/03/2021

Before :

THE HONOURABLE MR JUSTICE TROWER

- -

Between :

JSC COMMERCIAL BANK PRIVATBANK	**Claimant**
- and -	
IGOR VALERYEVICH KOLOMOISKY	**Defendant**

- -
- -

Andrew Hunter QC and Christopher Lloyd (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Tom Adam QC, Alec Haydon QC and Tom Foxton (instructed by **Fieldfisher LLP**) for the **Defendant**

Written Submission dated 26 February 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 12 March 2021

Mr Justice Trower:

1. On 24 February 2021, I handed down a judgment in which I refused an application by the claimant, JSC Commercial Bank PrivatBank (the "Bank") for an order that the first defendant ("Mr Kolomoisky") attend for cross examination before a High Court Judge in relation to his assets. With the agreement of the parties, I adjourned the questions of costs and permission to appeal to be determined on the papers without a further hearing. In the event, the Bank has not sought permission to appeal. This is my judgment on the costs of the application.

2. It is accepted that costs should be assessed on the standard basis and both parties agree that any costs order that I make should be subject to detailed assessment. In my view, that is a sensible approach. The relative complexity of the issues that arose on the application, and the amounts claimed in both parties' statements of costs mean that the case is not suitable for summary assessment.

3. Even though I dismissed the application for cross-examination, the Bank does not accept that it was in all respects the unsuccessful party, such that it should pay all of the assessed costs of Mr Kolomoisky in accordance with the general rule under CPR 44.2(2)(a). Whether the Bank is correct in that submission is the first matter with which I am concerned.

4. The second matter is that the Bank said that, if it were to be a net payer of costs, an order for payment on account would be inappropriate, because the information that Mr Kolomoisky chose to put before the court was insufficient to enable an assessment of an appropriate sum on account to be made. I must therefore reach a conclusion on whether relief is to be granted under CPR 44.2(8), and if so in what amount.

5. The substantive application was made by application notice dated 22 January 2021 and sought two heads of relief. The first was the order for cross-examination of Mr Kolomoisky that I have already mentioned, to take place on the first available date after 8 February 2021. The second was an order for further directions to facilitate the cross-examination, including a direction that Mr Kolomoisky file and serve an affidavit by 27 January 2021, providing information and exhibiting supporting documents in relation to the asset known as the "Bitcoin Investment".

6. The Bank submitted that it is appropriate to treat the application for an affidavit as separate from the application for cross-examination. It contended that Mr Kolomoisky should pay the Bank's costs of that application because, in the events that occurred, he was ordered to provide the affidavit sought. Mr Kolomoisky described that as an ambitious position, because there was no need for an application requiring the provision of an affidavit, because an affidavit was offered.

7. The background to this aspect of the dispute is that Hogan Lovells originally wrote on 8 January 2021 seeking information about the Bitcoin Investment. They expressed concern that it was about to mature. Further information about the Bitcoin Investment was then provided by Fieldfisher on 18 January 2021, when a detailed description of it was given for the first time. The provision of this information was immediately followed by a request for it to be confirmed on oath by Mr Kolomoisky by 22 January 2021. The date requested was not agreed, but Fieldfisher indicated on 22 January 2021 that an affidavit would be provided by 29 January 2021.

8. In light of the urgency with which the Bank contended that their application required to be heard, the court directed a listing hearing to be held on 26 January 2021. At that hearing, I directed that Mr Kolomoisky should file and serve a witness statement verified by a statement of truth containing the information and exhibiting the documents set out in the annex to the draft order attached to the Bank's application by 4pm on 29 January 2021. In that limited sense, Mr Kolomoisky is correct to submit that the order I made in respect of the provision of an affidavit or witness statement reflected what he had already offered.

9. However, I do not accept that this means that the application made by the Bank was unnecessary. Although, by the time the matter first came before me on 26 January Mr Kolomoisky had already volunteered to provide an affidavit by 29 January 2021, it became apparent from correspondence in relation to the form of order to be made after the 26 January hearing that the information which Mr Kolomoisky was offering to provide was simply to respond to such of the Bank's questions and requests for documents as "he is willing and able to respond to by" that date.

10. I ruled that this was insufficient, and did not reflect what I understood to have been offered at the listing hearing. In my view the appropriate form of order was that Mr Kolomoisky's witness statement should, to the best of his ability and having made such enquiries of third parties as were reasonably practicable, contain the information and exhibit the documents set out in the annex to the draft order served with the Bank's application notice. In other words, contrary to the submissions made on behalf of Mr Kolomoisky, I determined that a witness statement in the form sought by the Bank was a necessary and proportionate response to the issues that had arisen in relation to the Bitcoin Investment, rather than for him to be at liberty to provide that information and those documents by 29 January only if he was willing and able to do so.

11. I should add that Mr Kolomoisky also submitted that there would have been no need for the hearing on 26 January 2021 if the Bank had not acted precipitously in seeking to force the hearing of its application on short notice. While I agree that the Bank acted at a pace which was not in the event justified, I was satisfied (and said at the time) that the matter was urgent. In my view, in light of the attitude to the provision of information that became apparent immediately after the hearing, it would have made no difference to the need for a hearing and the consequential incurring of costs, if the Bank had proceeded with slightly less haste.

12. In my view, the history of the matter is consistent with the Bank's submission that, if the application had not been made, Mr Kolomoisky would not have agreed to provide a witness statement in a form that I concluded was both necessary and proportionate. To that extent, I consider that the Bank was the successful party in respect of this part of the application and that it was reasonable for them to persist with that part of the application in the form that they did.

13. The Bank also submitted that it should not be required to pay the costs of preparing Mr Kolomoisky's second and fourth witness statements. Mr Kolomoisky accepted that the costs of preparing his second witness statement should be costs in the case, and in my judgment that is the right order to make. As to Mr Kolomoisky's fourth witness statement, he rejected the Bank's submission that he should bear the costs of that witness statement in any event because it was rendered necessary by the

unreasonable timetable which the Bank insisted on. He said that, if the Bank had adopted a less hasty approach to the application, it would not have been necessary for this additional cost to be incurred.

14. I do not agree with Mr Kolomoisky's submission on this last point. Even if additional costs were incurred as a result of the speed with which the matter came on for hearing and the order made on 26 January was required to be complied with, it was nonetheless made necessary by matters set out in his second witness statement which required to be corrected or amplified. I consider that the order which best meets the justice of the case is for the costs of Mr Kolomoisky's fourth witness statement to follow the costs of his second witness statement and to be costs in the case.

15. Accordingly, the order should be based on a determination that Mr Kolomoisky was the unsuccessful party on the application for the provision of an affidavit or witness statement, but that the Bank was the unsuccessful party on the application for cross-examination. As to the actual costs of preparing Mr Kolomoisky's second and fourth witness statements, they should be costs in the case.

16. However, I have regard to the fact that the court is discouraged by CPR 44.2(7) from making an issue-based costs order. It must first consider whether a costs order based on the payment by one party of a proportion of the other party's costs is a more appropriate order to make. There are good practical reasons for this, because of the difficulties which can often arise on assessment in distinguishing between costs that are attributable to one issue as opposed to another.

17. In the present case, neither party has prepared a statement of costs which distinguishes between those costs which are properly attributable to the application for an affidavit and those costs which are attributable to the application for cross-examination. That is not entirely surprising as a material proportion of both parties' costs is capable of being attributed to both parts of the application.

18. I am satisfied however that the real substance of the application was for the cross-examination of Mr Kolomoisky. The application for an affidavit was important to the Bank, but had a subsidiary role in the overall dispute, and was only sought in its application notice as one of the directions (albeit an important one) to facilitate the substantive application. The Bank estimated that the costs of the affidavit application amounted to between 15 and 30% of its total costs. In my view, an appropriate proportion falls towards the bottom end of this range and the right figure to attribute to the costs of that part of the substantive application which related to the provision of an affidavit is 20%. Although they obviously took different steps in their preparation for the substantive hearing, I see no reason to adopt different percentages for the Bank and Mr Kolomoisky.

19. It follows that, in my judgment the justice of the case will be met by an order that the Bank should pay 80% of Mr Kolomoisky's assessed costs of the application and that Mr Kolomoisky should pay 20% of the Bank's assessed costs of the application.

20. Turning then to the application for a payment on account under CPR 44.2(8), the first question is whether I should make any order on the grounds that I have inadequate material to do so. In effect the Bank submitted that, in circumstances in which there was no full breakdown of the costs attributable to the application for cross-

examination on which it lost and the application for an affidavit on which it won, I either cannot assess a reasonable sum on account of costs and/or there is good reason for me not to make an order to pay any sum on account.

21. If there is no reason in principle for me not to make an order to pay a reasonable sum on account of costs, the second question I have to consider was described by Christopher Clark LJ in *Excalibur Ventures LLC v. Texas Keystone Inc* [2015] EWHC 566 (Comm) at [23] as follows:

> "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… 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."

22. I do not accept the Bank's submission on the first question. While the information that has been provided by Mr Kolomoisky is not very detailed, I am satisfied that I have sufficient material to enable me to take a view on the minimum net amount that he is likely to recover on a detailed assessment. I say net amount because I approach this question having regard to the fact that the Bank's claim for its costs of the application for an affidavit ought for these purposes to be set off against Mr Kolomoisky's claim for his costs of the application for cross-examination.

23. Mr Kolomoisky seeks a figure of £210,000. This is just under 50% of the costs totalling £428,920 for which a payment on account is sought. This sum is calculated by deducting the costs of producing Mr Kolomoisky's second witness statement from the total sum of £518,782 particularised in the statement of costs filed on his behalf prior to the hearing. It takes no account of the fact that I have concluded that Mr Kolomoisky lost on the application for an affidavit, and it includes such amount as is properly attributable to his costs of that part of the application. Applying 80% to the figures (of £428,920 and £210,000) claimed by Mr Kolomoisky gives figures of £343,000 and £168,000 respectively.

24. On any view, the amounts claimed are very substantial for the costs of a hearing which took up one day of court time and related to one aspect of the policing of a freezing order, and the Bank made detailed submissions on the excessive extent of the amounts claimed. However, it was submitted on behalf of Mr Kolomoisky that these costs were reasonably incurred and reasonable in amount and that he would be likely to receive around 65% on a detailed assessment. In support of this submission reliance was placed on a number of the factors identified in CPR 44.4(3).

25. As to the conduct of the parties, it was pointed out that time and cost were expended (unnecessarily) in ensuring that the court did not accede to the Bank's request for the hearing to be listed as early as 26 or 28 January 2021. Mr Kolomoisky also relied on the conclusions that I reached to the effect that the Bank did not adopt an appropriately measured approach to its application for cross-examination and proceeded with a predetermined course of action despite the emergence of sufficient

additional information and written materials. It was said on his behalf that the Bank's general approach was inappropriately aggressive and he relied on passages in my judgment in which I concluded that the Bank made several excessively wide-ranging requests which extended substantially beyond matters which it might reasonably have required to understand in order to police the freezing order. This he said was exacerbated by the late service of expert evidence without permission and without forewarning which had to be dealt with by his legal team but was then not even referred to at the hearing.

26. All these were matters which were said to have increased the costs unnecessarily and helps to explain why it was that very substantial costs were incurred on his side. It was also submitted that the Bank adopted a hasty and unfocused approach without regard to the real relevance of much of the material to the application being made. It was said that this required Mr Kolomoisky's lawyers to investigate and address a number of peripheral matters in an unfeasibly tight timescale.

27. As to the amount of money involved, the sum in issue at the trial is in excess of US$2.6 billion. It was submitted on behalf of Mr Kolomoisky that the costs spent on resisting an important application, such as one for the cross-examination of one of the defendants before trial, was both proportionate and reasonably incurred. He also submitted that the importance of the matter to the parties and its complexity meant that the application required a high degree of skill, effort and specialised knowledge. These are all factors which are relevant to the reasonableness of Mr Kolomoisky's costs.

28. I agree that this application was factually complex and clearly of considerable significance to the parties. I also accept that it was obviously a matter on which it was reasonable for Mr Kolomoisky to devote considerable resource in defending, and that this was likely to be the case would have been obvious to the Bank. I also accept that the nature of this litigation and the resources likely to be spent on it by both parties mean that what is reasonable and proportionate expenditure may well be found on a detailed assessment to be at the upper end of the spectrum. I also have regard to the way in which the application was made by the Bank and the inevitable increase in costs that occurred as a result of the speed with which the application was brought on for hearing.

29. Nonetheless, the amount of Mr Kolomoisky's statement of costs is almost twice the figure that would have been claimed by the Bank if it had been successful on all aspects of the substantive application. I am not conducting a summary assessment and so it is not necessary for me to examine the specific amounts in any great detail. However I have considered the Bank's criticisms of a number of the items in Mr Kolomoisky's statement of costs and take the view that a number of them are very substantially in excess of the amount that is likely to be recovered on a detailed assessment on a standard basis. This includes work done on documents totalling £175,000 and counsel's fees totalling £257,000 (where two separate leaders were instructed – Mr Haydon QC who led at the listing hearing and Mr Adam QC who led at the substantive hearing).

30. Doing what I can on the basis of the information available, it seems to me that it is unlikely that Mr Kolomoisky will recover more than 50% of either of those items on a detailed taxation, and it may well be rather less. I reach that conclusion bearing in

mind that the amount allowed will be "the lowest amount which he could reasonably have been expected to spend in order to have his case conducted and presented proficiently, having regard to all the relevant circumstances" (per Leggatt J in *Kazakhstan Kagazy v. Zhunus* [2015] EWHC 404 (Comm) at [15]).

31. In all the circumstances, it seems to me that for the purposes of assessing the amount to be paid by the Bank to Mr Kolomoisky on account of his costs of the application, a figure of 40% should be allowed. This percentage is to be applied to £300,240 (80% of the figure of £375,300, which is the figure claimed by Mr Kolomoisky less the costs of Mr Kolomoisky's second and fourth witness statements, which I have ordered to be costs in the case), which gives a total gross payment on account of £120,096.

32. It is then necessary to deduct from this figure an amount to reflect the Bank's entitlement to 20% of its costs of the application. I have not had detailed submissions on the right figure, but in my view a figure of 50% of the applicable amount claimed in its statements of costs is the right proportion. On the face of it, the Bank's statement of costs is not quite so extravagant as the statement prepared on behalf of Mr Kolomoisky. This means that the amount available for set off against Mr Kolomoisky's claim against the Bank is £28,500, which is 20% of 50% of the amount claimed in its statement of costs.

33. It follows that, in my judgment, £91,596 is a reasonable sum for the Bank to pay Mr Kolomoisky on account of his entitlement to the costs of the application. There is no good reason why it should not be ordered to pay that amount, and I will make an order to that effect. The parties are to agree an order and submit it for my approval in the usual way.