Neutral Citation Number: [2022] EWHC 1956 (Ch)

Claim No. BL-2022-000160

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 21st July 2022

Before:

MR. JUSTICE MILES

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Between:

CONSILIENT HEALTH LIMITED	**Claimant**
- and -	
GEDEON RICHTER PLC	**Defendant**

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- -

MR. STEPHEN HOUSEMAN QC and **MS. ANGELINE WELSH** (instructed by **Allen & Overy LLP**) appeared for the **Claimant.**

MR. ANDREW SCOTT QC (instructed by **Debevoise & Plimpton LLP**) appeared for **the Defendant.**

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Approved Judgment

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MR JUSTICE MILES:

1. This is a consequentials hearing concerning a judgment of 7th July 2022 ([2022] EWHC 1744 (Ch)). I shall not set out the background. Any interested reader should refer to my substantive judgment. I shall use the same definitions.

2. The first question that I have to decide is the terms of the draft order. The main point of contention concerns a schedule to the order, which sets out a series of undertakings offered by the defendant to the court. The terms of the undertakings were offered to the court on the second day of the hearing, 15th June 2022. I recorded in general terms the nature of the offered undertakings in my judgment, and in the dispositive part of the judgment I said that the application for enforcement of the Award would be adjourned against the undertakings.

3. Since the hand down of the judgment the defendant has produced a draft order, which included in a schedule the terms offered by it on 15th June 2022.

4. The claimant responded that the various undertakings that were offered were not sought by it, that they should be deleted from the draft. They sought instead an undertaking that, until further order of the court, the defendant would procure that the full Registration Dossiers, and other information referred to in the Award, should be stored and located in a virtual data room, fully accessible and downloadable at all times by individual representatives of the defendant and the defendant's legal counsel in its London office, such that they could be transferred to the claimant on 48 hours' written notice; that this virtual data room should be maintained, including through the payment of any relevant hosting fees; and that the documents and information in the virtual data room be maintained such that at any given time the information and documents are fully accessible and downloadable.

5. The claimant explained in correspondence why it rejected the undertakings offered by the defendant. It did not however comment on the wording of the offered undertakings or propose any different wording. Instead it put a line through them.

6. Counsel for the claimant submits that the undertakings offered by the defendant should be deleted from the draft order in their entirety. He submits that in certain respects they would put the claimant in a worse position than it is otherwise in, including by possibly requiring it to provide confidential pricing information. He also contends that some of the suggested undertakings are tendentious in their wording, and presuppose forensic positions taken by the defendant in their disputes with the claimant in a way favourable of the defendant. He also submits that in other respects the undertakings are not workable. Counsel for the defendant says that these concerns can be met by drafting but that the claimant has not suggested any other wording.

7. I have reached the following conclusion. The undertakings were offered for the protection of the claimant. I addressed some of the undertakings in the course of my judgment in general terms. These included an undertaking which required the provision of security backed by cash or a guarantee to protect the claimant in the event that it was later able to prove it could have obtained cheaper supplies. I also addressed the offered undertakings to transfer the trade marks, and to supply the claimant with Collaboration Products at IFRS plus 20% prices and the ability to audit the relevant books and records of the claimant.

8. Since the claimant does not want the protection of these undertakings, there is no reason to include them in the order.

9. I should, however, record the following point in case this matter goes further. I discussed the undertakings in the course of my judgment and explained that, to some extent, they went to mitigate or meet potential forms of prejudice to the claimant from the delay caused by the adjournment. I did not think they gave complete protection or compensation for the various forms of prejudice, but that they went some way to doing so.

10. In the course of the substantive hearing in June the claimant rejected the proffered undertakings. It did not seek to suggest alternative wording or different forms of security. Its point at the hearing, which it maintains, is that because the Award was mandatory in nature and related to the transfer of a business and assets, there was no set of undertakings that could protect it from the prejudice it would suffer from the business and assets not being transferred in accordance with the timetable set out in the Award.

11. What the claimant has not done is comment on the detailed drafting of the undertakings that have in fact been offered. It has not suggested revised or improved wording. In so far, for example, as it complains that the first undertaking might require it to provide confidential information in due course, it has not proposed any mechanism to deal with that. The court is well familiar with confidentiality rings and other processes for dealing with confidential information, but the claimant has not made any proposals in that regard.

12. Similarly, in relation to its complaint that the wording of the undertakings is tendentious or could be said to presuppose the outcome of various disputes between the parties, including as to the need for further confidential information protections, the claimant has not suggested any wording which would preserve the arguments of the claimant in that regard. It would not be very hard to produce wording which was not tendentious, and which did not presuppose either party's position in relation to such matters to be right or preserved their arguments. The claimant has chosen not to suggest any such words.

13. It is up to the claimant whether it wishes to have the benefit of these undertakings, and it has decided not to. However, it does seem to me right to record, in case this matter goes further, that appropriately worded undertakings could be given, which would provide the claimant with the types and degrees of protection set out in the main judgment. I do not think the claimant should be able to obtain any sort of forensic advantage by simply deleting the undertakings which have been proffered by the defendant from the order without the process by which this has come about being recorded in this judgment.

14. I repeat that in my view it would have been possible to devise with wording which many of the concerns which have been outlined by the claimant it has chosen not to take the usual approach of seeking to agree better wording to meet its drafting concerns. I also repeat, however, that the claimant's position is that there is no set of undertakings which could possibly provide it with protection against the delay caused by the adjournment of the application to enforce.

15. As for the suggestion that a different undertaking should be included concerning the Registration Dossiers, I should start by noting this point was not advanced at the hearing. The claimant says that during the June hearing the court itself raised the possibility of some sort of escrow arrangement, but that was not a point that was then pursued, developed or expanded upon by the claimant at the hearing. I did not therefore hear debate about it and the suggestion died away.

16. There was however some discussion at the June hearing about the jurisdiction of the court to make orders in respect of parties who are located abroad. The defendant took the point that in an application of the present kind, for enforcement of a New York Convention arbitration Award, the court did not have jurisdiction, whether in the strict sense or in the sense of a properly structured exercise of its discretion, to make orders in respect of individuals or entities located outside the jurisdiction and without sufficient connection with the jurisdiction.

17. In the light of my decision to adjourn it was unnecessary for me to reach any view about those points and I did not do so. However, as already mentioned one thing which was not debated at the hearing was the suggestion of an interim undertaking in the terms now being sought by the claimant. It seems to me that this suggested undertaking potentially gives rise to the serious arguments about the territorial competence of the English court in relation to an application to enforce an arbitration Award.

18. It seems to me that the principle of finality, which was recently discussed in *AIC Limited v Federal Ports Authority of Nigeria* [2022] UKSC 16, applies in the present case. Counsel for the claimant, suggested that that case was concerned only with the situation where an order has been made but not sealed, and he says that is not this case. I do not read the Supreme Court as restricting their analysis in that way. Indeed in paragraph 32 the Supreme Court explained that the principle applies also to a reconsideration of a final judgment as well as an order before the order has been sealed. The considerations which underpin the principle of finality include the requirement that the parties bring all available arguments before the court at the hearing and, more generally, those parts of the overriding objective which require hearings to be conducted in an orderly and efficient fashion. Those considerations apply to interlocutory hearings as well as trials.

19. In this case the June hearing took two very full court days. It was for the claimant to bring before the court at that hearing any suggestion it had as to alternative forms of protection. If this point was to be raised at all, it seems to me it should have been raised at the hearing and not as a matter of the consequential process of drawing up an order designed to give effect to a fully reasoned judgment. There was also, of course, a period between the end of the hearing on 15 June 2022 and the giving of the judgment on 7 July 2022 in which the court's resources were engaged in giving judgment and it was only after judgment was given that the undertaking which is now sought was first suggested.

20. It seems to me that in these circumstances the court should give effect to the finality principle. This is the more so, given that, as counsel for defendant says, the undertaking would engage or at least give rise to potentially involved and difficult arguments about the extraterritorial competence of the court. In all the circumstances, it seems to me that it would be wrong for court now to entertain further argument about the appropriateness or otherwise of what is now being suggested in the draft undertaking about the registration dossiers. I do not think that it is properly a matter for a

consequential hearing which is about the terms of an order intended to give effect to my judgment.

21. Accordingly the schedule will be removed altogether from the order and there will be no recital referring to the schedule at the start of the order. There is one further point in relation to the drafting of the order which concerns paragraph 3 on which I have not yet been addressed by the parties.

[Further Argument]

22. I turn to costs.

23. The defendant invites the court to make an order for the costs in its favour. It seeks the costs attributable to the adjournment application. The defendant says that the general rule under Part 44.2 of the CPR is that costs should follow the event. It says that the request for an adjournment was the main event that was ruled upon at the hearing and that the defendant, which succeeded in obtaining an adjournment, was the successful party.

24. The defendant accepts that the court may make a different order if in all the circumstances it considers it just and right to do so, but it says that there is no proper basis for departing from the general rule here.

25. The claimant has three positions. The first is that the court should reserve the costs, the second is that there should be no order as to costs, and the third is that if costs are ordered in favour of the defendant there should be a heavy discount.

26. I start with the claimant's primary argument, that costs should be reserved. The claimant says that there is an analogy between the present situation and a line of cases which were summarised in the decision of *Wingfield Digby v Melford Capital Partners* [2020] EWCA Civ 1647. That line of cases concerned the grant of interim injunctive relief on the basis of a balance of convenience and where the court is unable to reach a concluded view on the merits at the interim stage. The general rule in such cases is that costs will be reserved.

27. Part of the reason for that rule is that any other order would potentially work injustice, because at the end of the case it may very well be the case that no injunctive relief should have been granted. A second reason for the general rule, which is related to the first, is that it may well be difficult to determine which party has been successful, in the sense that any success of one of the parties at the interim stage is merely provisional.

28. The claimant submits that a similar approach should apply here at least by way of analogy. It accepts that this was not strictly a case of an interim injunction, but says that, in substance, the court's order holds the ring and that the court has not reached any clear view as to the merits of the challenge to the Award in the Amsterdam courts. The court has exercised a discretion in all the circumstances and has reached an overall conclusion based on, amongst other things, the potential prejudice to the parties of, on the one hand, making an order for enforcement immediately and, on the other, adjourning the enforcement proceedings until the conclusion of the Amsterdam challenge proceedings. The effect of the order is to prevent the claimant from enforcing

the Award and the underlying reason for this is the balance of prejudice were that to take effect at once.

29. The defendant says that the analogy with interim injunctions is a false one as the court will not in this case have to revisit the question whether an adjournment should have been granted. Therefore, it is not like the case of an interim injunction where the court at trial will substantively decide whether an injunction should be granted. The defendant says that it is possible to say now who was the successful party as the contentious issue between the parties was whether there should be an adjournment, and this a discrete event in the proceedings. The defendant says that it is not dissimilar to any other procedural step in proceedings such as an application for specific disclosure or a jurisdictional issue.

30. I prefer the submissions of the claimant. This case does not of course in form concern an interim injunction. But there is a close analogy. The adjournment was ordered in the context of an application by the claimant to enforce the New York Convention Award in its favour. The only defence to the enforcement of the Award was the existence of the challenge proceedings in Amsterdam. I was not able to reach any clear or concluded view as to the merits of that challenge. I then went on to consider the potential prejudice to the parties of either adjourning or immediately enforcing, and I was required in that context to balance the respective prejudice to the parties. The balance of prejudice was crucial.

31. Although this is not strictly an *American Cyanamid* case, it does seem to me that there is a fair analogy between the cases being discussed in *Wingfield* and the present case. In effect the court has had to weigh up the kind of factors that would go to the balance of convenience in the case of an injunction. Moreover it seems to me that the substance of what has happened is that the defendant has managed to prevent or restrain the claimant from doing what it would otherwise be entitled to do, namely enforce the Award in this country, on the basis of factors going to prejudice. I agree with the claimant that the court has effectively made an order holding the ring pending the Amsterdam court's ruling and, in doing so, has balanced the risks of injustice to the parties. It also seems to me that it may very well turn out to be unjust that the defendant should have the costs of the present exercise in circumstances where the challenge to the Award turns out to fail and the defendant therefore has no defence to the claim for enforcement. In that case the claimants will fairly be able to say that they should have been allowed to enforce now and have been kept out the benefit of the Award by reason of the adjournment. The position is again analogous to that of a respondent to an injunction who establishes at trial that it should not have been granted (in the sense that it was never justified). (I am not in this judgment expressing any views either way about any contentions the defendant may raise if the Amsterdam challenge fails, including those mentioned in [16] above.)

32. The defendant correctly says that there has been an argument about a particular point, and it has resulted in an order favourable to his client, but it seems to me that that argument ignores the substance of the matter, which is that the court has effectively decided to hold the ring pending the conclusion of the Amsterdam proceedings and that the substance of the reasoning in the *Wingfield Digby* case therefore applies.

33. In these circumstances, I consider the right order is to reserve the question of costs, and it is unnecessary to consider the second and third positions taken by the claimant.

[Further Argument]

34. The claimant has helpfully provided draft grounds of appeal. Before turning to the grounds themselves, I observe generally that the exercise I undertook was an exercise of the discretion contained in section 103(5) of the Arbitration Act 1996. An appellate court will only interfere with an exercise of discretion where the court below has erred in principle or has failed to take into account relevant factors or reached a decision which is outside the ambit of the discretion, in the sense of being one that no reasonable tribunal could reach.

35. I have considered the draft grounds of appeal. I do not consider that they have a real prospect of success.

36. Grounds (a) and (b) are essentially concerned with the contention that previous authority has been concerned with monetary Awards, whereas the present case concerned an order for specific performance. It does not appear to me that these grounds or my approach to this point in the judgment involved any error of law. It is clear from the authorities that the court has a broad and unfettered discretion under section 103(5). That is to be exercised against the background of the pro-enforcement philosophy of the New York Convention, which was something which has been set out repeatedly in the authorities, which I applied. It seems to me that the underlying principle is the same in all cases: that the court must consider all of the circumstances and must take into account the potential prejudice to the parties of the Award either being immediately enforced or enforcement being delayed pending the challenge proceedings. The court may take into account also any protective or amelioratory security or undertakings that may be available pending the outcome of the challenge proceedings. The court is also required to undertake a brief evaluative exercise of the merits. As I explained in my judgment the mandatory nature of the relief may have a bearing on the kinds of prejudice that the parties may respectively suffer, but that is simply an application of the general principles set out in the authorities, not a reason for saying those principles do not apply. The approach I followed in the main judgment follows the orthodox guidance given in the authorities.

37. It seems to me that these two grounds essentially invite the court to conclude that because the fact pattern of the present kind has not been dealt with in earlier decisions, that, itself, is a ground for the Court of Appeal to entertain an appeal. I do not think that can be right. The only basis on which the appellate court will entertain an appeal is that the judge below has gone wrong in the relevant legal sense (see above). The Court of Appeal will not entertain an appeal simply because the factual situation is novel.

38. Ground (c) appears to be advanced on the basis that the arbitral tribunal itself has weighed up the prejudice to the parties in deciding whether to grant mandatory relief. I do not think there is a realistic chance of this ground succeeding. It ignores the difference between the role of the arbitral tribunal when deciding what relief to grant and the role of the enforcing court in a case where challenge proceedings have been brought to the Award of the arbitral tribunal. The basis of the adjournment here was that the defendant has challenged the Award. Its challenge is based on res judicata, not on the way the tribunal exercised its own powers to grant mandatory relief. There is a realistic argument that if the Award goes, then the decision of the arbitral tribunal to

grant mandatory prescriptive relief will fall away. So it seems to me that there is nothing in that point.

39. As to point (d), the claimant contends that the undertakings offered by defendant during the hearing were by definition inadequate to protect the claimant against the prejudice. I consider this to be a challenge to the weight given to certain factors in the exercise of my discretion. I did not consider that the undertakings that were given were a complete answer to the prejudice that might be suffered by the claimant. Indeed, I made it clear that they were not. Nonetheless, I took them into account as part of the overall discretionary exercise. As already explained, it does not appear to me that there is a bright line of the kind being suggested by the claimant between money judgments and other kinds of mandatory prescriptive relief. In every case, it is a matter for the court to consider the prejudice to the enforcing party of any delay and to consider any amelioration of that that might be available. The fact that the relief is mandatory may lead to different forms of prejudice to the parties if enforcement is delayed or is immediate. But the principles are the same. Indeed, the case law shows that even in cases where monetary security is given, the court does not always regard it as complete compensation or protection for the enforcing party, which, after all, is being prejudiced by being kept out of its money. None the less, the courts reach an overall view in the exercise of their discretion as to whether an adjournment should be granted. That is the approach I followed and the challenge is to the weighing of factors.

40. Point (e) again concerns a similar point, which is that it was impossible to fashion or give adequate counter-security. This point does not appear to me to advance matters beyond point (d). It is advanced under a slightly different guise. In my judgment I did not draw a false analogy with monetary Awards. Instead, I recognised, as the case law shows, that in exercising its discretion that the court should take into account both the prejudice to the enforcing party and any amelioration of that through the provision of security. That is entirely orthodox. As already explained, the mandatory nature of the relief may affect the nature of the prejudice potentially suffered by each party but that is something I considered in the judgment.

41. As to point (f), the draft ground of appeal in terms accepts that this is a point about the weighing of various factors. This is an unpromising start for a ground of appeal in relation to the exercise of discretion. This ground criticises the judgment for referring to an unfettered discretion, but that is a term which is drawn from the authorities, which have been approved by the higher courts.

42. The ground also suggests in passing that the court prioritised prejudice to the defendant over the claimant. That is not a proper description of the judgment. The judgment considered the evidence about the prejudice to the parties respectively, without in any way prioritising one above the other. The court reached a view overall as to whether an adjournment should be given but did not do so on the basis of an *a priori* assumption that prejudice to the defendant was more important than prejudice to the claimant.

43. The sub-grounds of ground (f) concern specific elements which it is suggested were improperly weighed. These seem to me all to be matters that fell properly to be weighed in the balance. As already noted, an appellate court will not interfere with the lower court's decision about the weight to be given to various factors unless it concludes that the decision was irrational. In particular, the appellate court will not interfere with a

discretionary decision, even if it considers that it itself would have reached a different one unless it concludes that the judge went wrong in the relevant sense.

44. Moreover the list of factors includes several which were specifically considered by me in the main judgment. This is shown by the fact that the judgment addresses each of these points, and the grounds of appeal specifically refer to the judgment.

45. Accordingly I do not think there is any real prospect under head (f).

46. Ground (g) is, again, a complaint about the evaluation of the delay, which is, it seems to me, a factor that fell to be taken into account in the overall exercise of the discretion. It seems to me that there is no realistic prospect of showing that this factor, or the court's consideration of it, in any way vitiated the exercise of discretion.

47. Ground 2 is conclusory and presupposes that the appellate court will interfere with the discretionary exercise carried out by the court. But for the reasons already given I do not consider that there is any realistic prospect of that happening.

[Further Argument]

48. I now address the question of the costs of today. The claimant says that the costs of today should be the claimant's costs in the case. It contends that it was successful in relation to the form of the order. It says that the defendant was seeking to force an order containing undertakings on the claimant. It says that in relation to costs it was successful in its argument that the costs should be reserved, and it successfully resisted the defendant's application for costs. It accepts that it did not succeed on the question of permission to appeal.

49. The defendant says that, in fact, it was successful in relation to the form of the order. The only reason why the undertakings were removed is that the claimant said it did not want them, and the claimant failed in its attempt to procure alternative security. It says that the claimant failed on permission to appeal, and that although the claimant was partially successful in relation to costs, it only abandoned its argument that it should have the costs in the course of the hearing.

50. It seems to me that the right order is that the costs of this hearing should be costs in the case.

51. The parties needed to come to court to settle the terms of the order. They were unable to do so. It seems to me, also, that when it became clear that the claimant did not wish to have the undertakings contained in the order, and the court indicated that it would give a ruling explaining that there should be no forensic advantage to the claimant from the removal of those undertakings, the defendant accepted that position. But it effectively did so on the basis of the court's indication that it would give a ruling to that effect, which I have done. Moreover, the claimant did not succeed in obtaining the alternative security that it was pushing for, and I came to the conclusion that, amongst other things, it would be inappropriate to order such security in light of the principles of finality. The claimant did not succeed in obtaining permission to appeal and some time was spent on that. In relation to the argument about costs, the claimant succeeded in its primary argument, but it is also right to say that it had threatened an application for costs in its own favour.

52. Overall each party was partially successful. This was a case management hearing, which was necessary in order to settle the order. The right order is for costs of the hearing should be the costs in the case.

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