Neutral Citation Number: [2022] EWHC 1788 (Comm)

Case No: CL-2017-000730

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

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

Date: Monday, 4th July 2022

**Before**:

**MRS. JUSTICE COCKERILL**

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**Between:**

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| **THE FEDERAL REPUBLIC OF NIGERIA** | **Claimant** |
| **- and -** | |
| **JP MORGAN CHASE NA** | **Defendant** |

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**MR. ROGER MASEFIELD QC, MR. RICHARD BLAKELEY** and **MR. JONATHAN SCOTT** (instructed by **Reynolds Porter Chamberlain LLP**) appeared on behalf of the **Claimant.**

**MS. ROSALIND PHELPS QC, MR. DAVID MURRAY** and **MR. AARON TAYLOR** (instructed by **Freshfields Bruckhaus Deringer LLP**) appeared on behalf of the **Defendant.**

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# Approved Judgment


Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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## MR. JUSTICE COCKERILL :

### Judgment on Permission to Appeal

1. Thank you very much. Mr. Masefield, I am not going to give you permission to appeal. While I am grateful for the focus and clarity of your grounds, the fact that you have produced grounds (which is by no means always the case) and the courtesy with which the submissions have been made, I do not regard either of the grounds as having real prospects of success. I will deal with real prospect of success first before dealing briefly with the "some other compelling reason" ground.

2. Ground 1 concerns the 2011 fraud and by extension also the 2006 fraud. The primary submission is that I misdirected myself on the law. This is done largely by reference to authority which was certainly not cited in closing and I am not sure whether it was cited at all. Whether or not it was cited, I do not consider that there is real prospect of success in relation to this.

3. The proposed appeal really breaks down into a case on error of law, and a factual appeal.

4. On the error of law aspect, the authorities to which I referred in the judgment were entirely conventional. The summary which I then produced synthesising them, one might say summarises them rather in favour of the claimants than otherwise. It is not the case that I actually took any of the tests from those cases and applied that test. The approach taken by me is not fairly summarised in my view in the application and certainly the submissions made on the law are not ones made to me at the time.

5. So far as the summary which I did use goes, the proposition that there needs to be a fact tilting the balance in favour of fraud is effectively simply a more specific way of re-stating the balance of probabilities test. You cannot win unless one side is more likely than the other; and that is effectively what is encapsulated in paragraph 209(1) and then in 209(4) of the judgment. And that is the test for which the Claimants contend.

6. As for the submission that I erred in considering each fact *seriatim* before considering overall, there was no authority cited for the proposition that that is a wrong thing to do; and this really feeds into the wider appeal, which is an appeal on the facts. That second aspect of the fraud appeal, although under cover of a legal argument, really amounts to an argument that I misevaluated the factual evidence.

7. For all that it is said that the Court of Appeal are more ready to look at this sort of question than they were in days of yore and that the factual findings they would need to do so quite expeditiously are there and that the issues are predominantly in the documents, so that it is not necessarily a question best left to me, it remains the case that the Court of Appeal says again and again that complex questions of factual evaluation are best done by the trial judge. There is ample authority demonstrating their unwillingness to go behind such findings.

8. I have listened carefully to the submissions made and with the best will in the world I am not persuaded that this is a case where be more than a fanciful chance the Court

of Appeal would do that. The submissions on one side effectively rest on points which I carefully considered and on which I formed a very clear view. I have discerned a clear line between the Malabu corruption, which can be traced through, and a principled basis for putting Mr. Adoke the other side of that line. The submissions now made are a rerun of that on which I am satisfied there is no real prospect of success. The difference is the addition on top of extra effectively new submissions, which are entirely different to those advanced before me. For example, there is what appears to be a similar fact-type argument based on matters which probably are not admissible and a question as to the legal relevance of close associate status. Considering it very carefully even with these additions, and even stepping back and re-interrogating myself on it, I remain of the view that this is a question on which there is no real prospect of success.

9. In relation to Ground 2, gross negligence, again, I consider there is no real prospect of success. In part there is an element of that which is dependent on the first limb because the gross negligence is one step down the chain. So if no real success on Ground 1, then no real prospect of success on Ground 2. But even if it stood alone, I conclude that there is no real prospect of success.

10. Again there has been something of a misstatement of my approach. I did summarise some of the other authorities in order to highlight the need for there to be a clear distinction maintained in one's mind between casual negligence and gross negligence and I used some of those authorities to point that distinction, but I then went on to highlight that I was applying the test from *The Hellespont Ardent* and making my findings in terms of those tests. So it can be seen that I very carefully applied the test from *The Hellespont Ardent*. So the argument again appears to be an attempt to go behind the way I have put it, alternatively to rewrite *The Hellespont Ardent* test in a way which was not really argued before me.

11. So far as the factual side of it goes, it is submitted that I made a finding of negligence and the argument jumps off from there. To be clear, the question of negligence per se was not an issue for me and I did not have to decide it. What I said was that the bank was "on notice of a risk, possibly amounting to a real possibility of the relevant fraud". That is not a finding but an indication of roughly where in the scale the risk sat.

12. What that does illustrate is that on any basis, without completely reworking the factual analysis, you are at a place which is a country mile away from gross negligence, whatever the epithet one uses to describe gross negligence. It follows that even if this ground were to stand by itself, this prospect of success would be no more than fanciful.

13. Finally, the argument has not explicitly been put before me on the basis of some other compelling reason. I can see it is possible, given the amount in issue and the status of the claimant as a country, that that is a point which might be argued. I am not going to consider it, I have not been asked to and I very firmly am of the view that arguments about some other compelling reason are ones for the Court of Appeal, not for this court. That is the more so when I have made clear the arguments which are sought to be raised are ones which ask the Court of Appeal to pick through detailed factual findings and would consequently on any analysis be asking the court to take

a good deal of its time effectively reworking the judge's factual homework. So you can obviously go and ask the Court of Appeal, Mr. Masefield, but no.

## Judgment on Costs

14. I now have to make a decision on the basis on which costs are awarded. I am going to give a brief set of reasons which can be given a little bit more amplification and context if anybody wants to take my decision any further.

15. The backdrop to this is that this is a very serious issue of course in this case, given the size of the costs in issue. The question of basis can make an enormous difference.

16. The starting point for me here is I am not looking at what one might call a classic indemnity costs case. This is not a case where outside the factor of the indemnity clause effectively one would be looking at a submission in relation to indemnity costs. That is a submission which Mr. Masefield has made and I completely accept that submission.

17. So the starting point has to be the indemnity clause. Even to the extent that I conclude that the indemnity clause does bite, I still retain a discretion. The point between the parties is whether it applies between the parties to the agreement or only to third parties. The Federal Republic of Nigeria says that it does not. It says that even the second half of 10.1(b) is directed to third-party claims because of a number of factors; in particular, the reference to negligence as opposed to gross negligence.

18. JP Morgan says this is a different clause to 10.1(a) which Professor Burrows said and the Court of Appeal says applies to third-party claims. It also says that if you "just read it", you can see that it does apply to a situation such as this.

19. Cutting a long story short and doing no justice at all to the detail of the argument, I agree that 10.1 is, looked at overall, something which is primarily directed to third-party situations. But, having said that, there is nothing in the wording of (b) which confines it to third-party situations only. One looks at the relevant parts of 10.1(b) in the context of the lead-in to the main part of 10.1 - which covers costs, claims, losses, liabilities, damages and so forth imposed on, incurred by, and so forth - and then you go down into (b) with "or otherwise arising or under or in connection with" -- "(including, without limitation, the costs of the Depository defending itself successfully against alleged fraud, negligence or wilful default)."

20. Those words are ones which one would expect to answer to this fact situation. Suppose, for example, the Federal Republic of Nigeria wrongly accused JPM of fraud. It would seem odd if that indemnity were not to answer with wording such as there is. The broad words of the clause, read in the ordinary and natural sense, in my judgment suggest that the clause is apt to cover.

21. The Federal Republic of Nigeria has said that would lead to a complication because the court would then need to find if JPM had been negligent in order to see whether

the exception were to bite and that that would be an odd fit. It seems to me that is reverse engineering the argument, which is not permissible. Further in my judgment, while there is a carve-out needed for circumstances in which the clause does not bite, one can see it is intended to match against the allegations. So, in my judgment it would be designed to disapply if, for example, there was fraud established. It is designed to disapply if the negligence which is alleged is established. It is not designed to create a system for double findings. Thus one reads it as matching the allegation.

22. So that is the starting point in my judgment; the indemnity clause is on its face apt to cover what has happened in this case. But that does not mean that as night follows day one goes into indemnity basis. While the court has said that the discretion should ordinarily be exercised to reflect the contractual right, it is conceded that I have a discretion as to exactly how to apply it. Briggs LJ in *Littlestone* did not specifically say that the indemnity basis should be applied, and he was dealing with specific words in that case. One must also bear in mind the need for a degree of nuance, bearing in mind the other facts of the case, for example the kinds of facts I am dealing with in this kind of costs argument today.

23. The next factor, *Calderbank* offers. The law is clear: it does not follow that because there has been a *Calderbank* offer there will be liability on the indemnity basis. See *Excelsior*. The *Calderbank* offers here: I can see that there are a number of factors why JPM would say that there ought to be real weight given. However, I am not minded to regard this as a particularly heavy factor assisting JPM in the balance towards indemnity costs in a situation where I accept that that is highly complex litigation. I do accept that the offers were low judged against, for example, what was in play in 2013. I do of course note the point made by Ms. Phelps, that certainly as at a particular point in the time line there was a decision in Italy in relation to the fraud; but at the same time, that continues to be an ongoing story. We are at a particular point in the time line that there was much still to think about. I also bear in mind that, as Mr. Masefield pointed out, this is not a Part 36 offer case, and if there were a Part 36 offer, then even then it does not follow that one would order indemnity costs. So while I do understand why weight is put on it by JPM and I have given it careful thought, I am not minded to put a huge amount of weight on the failure to accept the offer.

24. The truth is that what one sees here sees here is thoroughly different views of the merits of the case which, on the analysis which I have taken post-trial, I consider to be wrong on the part of Federal Republic of Nigeria, possibly misguided; but I say that post-trial, and there is a danger of looking at it with the benefit of hindsight.

25. I then turn to the question of issues-based costs order. There was a slight difference between the parties on the law as to the need for unreasonableness. Mr. Masefield took me to various portions of the White Book and so forth, pointing out that the need for unreasonableness in order to get an issues-based costs order was done away with by the CPR reforms.

26. However, having said that, he took me to a passage in one of Lord Woolf's judgments saying that the courts would be much more ready to make issues-based costs orders post the reforms. History has not entirely borne him out on that. In subsequent cases there are any number of dicta about the importance of maintaining at least in broad

terms the overall principle that costs follow the event, albeit while trying to hold that line to which he alluded, of discouraging parties from a "no stone unturned" approach to litigation.

27. Where the balance of authorities lies at the moment is that issues-based costs orders are not often made. They tend to be only made in cases where there is truly a discrete issue, and the authorities from the Court of Appeal enjoin the poor unfortunate trial judge to consider first whether it is appropriate to make a percentage-based reduction before launching into the complexities of an issues-based costs order. So far as issues-based costs orders are concerned, I would also say that while I do not accept the full extent of JP Morgan's argument about the need for unreasonableness, it is the case that, reflecting the authorities to which I have just referred, it is an unusual case in the modern world where you end up with an issues-based costs order such that you do not simply knock off something for that issue but also award the costs of that issue to the overall unsuccessful party who has been successful on that issue.

28. All of that means that in this case I am not going to make an issues-based costs order. This is a case where the Nigerian law issues might be said to be more discrete than many, and there will be discrete elements that can be picked out - but they are still hideously entwined in the rest of the preparation. For example, how do you pull out the time referable to submissions, the time referable to preparation? We do not want to get into the line counting from the transcript and so on and so forth. Then there is the additional complication that the largest of the issues which might be tempting to regard as a discrete issue is one where a significant chunk of the costs has already been dealt with in relation to the summary judgment and the bank has already borne much of these costs. So there is danger of creating a further subsidiary difficulty in splitting out costs.

29. The other issues: the other Nigerian law issue is one best seen as part of the claim. The other issues are in my view really issues which are exactly the sort of thing which are generally intended to be swallowed by costs following the event or a very small percentage reduction.

30. So, putting all of those things together, the conclusion which I reach is that JP Morgan should have its costs but they should be on a standard basis. That reflects the fact that there is an indemnity clause which is giving JP Morgan some assistance, but it also gives something in the direction of Federal Republic of Nigeria, in particular in relation to the issues of Nigerian law.

31. It also gives scope for the court's discretion in a case where it seems to me that there is a danger, if one gives an indemnity costs order, of doing precisely the thing of encouraging parties in the "no stone unturned" approach to litigation. So in this case it seems to me the justice of the case and the various arguments are best reflected by giving JP Morgan costs on a standard basis.

32. We are going to move on to a question of payment on account. I am just going to say now loud and clear that because I have just said standard and because of the frankly enormous sums involved, I am thinking small percentage, so the figure which is in my mind at the moment is somewhere well below 50%. I just put that there as a framework for the debate which will follow.

## Judgment on Payment on Account

33. Thank you very much. Bearing in mind the very large amount of money and the authorities, and I do tend to follow the approach outlined by Leggatt LJ in *Dana Gas* so far as one is able.

34. The figure to which I would come would be somewhere around 40%. I am going to say 9 million, which I think is fractionally over 40%. I might have gone a little lower, because I do think it in these cases where there are very, very big sums as stake, the margin for a bigger reduction on assessment is considerable. However, the hourly rates in this case do not appear to be too appalling, so I have come up a little from where I would have been if they were higher. So 9 million.

35. On timing, 28 days. It is a very large sum of money. Governments have procedures which they have to go through, but the payment ought to be made or not made before JPM have to put in their document in relation to appeal.

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