IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2021] EWHC 1352 (TCC)

No. HT-2021-000012

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 19 April 2021

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

CELTIC BIOENERGY LIMITED — Claimant

- and -

KNOWLES LIMITED — Defendant

MR A. LYONS (instructed by DAC Beachcroft LLP) appeared on behalf of Claimant.

MR D. HALE (instructed by Isca Legal LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE WAKSMAN:

Introduction

1 On 23 October 2020, the arbitrator, Mr Vaughan, who had dealt with the underlying disputes between the claimant and the defendant, made an award of costs in favour of the claimant in the sum of £309,285.12. That award related to his determination of two discrete issues. The first known as the "initial issues" was, in fact, debated before and decided by the arbitrator as a matter of substance in, I think, 2015: the core point being whether, as the claimant contended, the defendant's fees were capped or whether, as the defendant contended, they were not, resulting in a much larger claim for the fees in respect of work done by the defendant for the claimant in relation to the underlying issues with Devonshire County Council.

2 The second dispute in respect of which those costs were awarded was a later determination by the arbitrator in relation to the effect of and the extent of counterclaims which had been advanced by the claimant by way of a setoff against any fee award.

3 He resolved both of those issues, essentially, in favour of the claimant, finding that there was a modest counterclaim, though not to the extent of the amount claimed by the claimant.

4 The defendant did not pay those costs as awarded nor did it seek to challenge the costs award in any way. Accordingly, on 13 January 2021, the claimant applied to the court, without notice in the usual way, pursuant to particulars of claim, to seek the permission of the court to enforce the costs award as if it were a judgment, pursuant to s.66 of the Arbitration Act 1996. I will call that the "application to enforce".

5 On 2 February 2020, O'Farrell J made that order, the enforcement restriction order. She also ordered that the defendant should pay the claimant's costs of the application to enforce. As is also usual, since this was a without notice application, the defendant was given 14 days in which to apply to set it aside. It made no such application.

6 However, on 24 February 2021, it made the application which is now before me and that is for a stay of the enforcement order. However, it, itself, was served without notice and only served on the claimant on 16 March.

7 The basis of the stay application, at least as enunciated in the witness statement of Mr Rees, dated 18 February 2021, and in Mr Hale's skeleton argument, was this. The claimant had succeeded in an earlier s.68 challenge to an award of the arbitrator. This was not because of any irregularity or unfairness committed by the arbitrator, himself, rather it was because the award, as found by Jefford J, had been procured by fraudulent misrepresentations on the part of the defendant, In the course of that judgment, Jefford J, apart from dealing with the finding of fraud, said, in para.39, that

> "the almost inescapable conclusion from this history of events is that Knowles were attempting by any means possible, and however inappropriate or unsustainable, to obtain payment of fees, whilst at the same time seeking to avoid payment of costs."

For reasons which will become apparent, I do not regard that serious observation to be wholly irrelevant to the application before me.

8 The result of the s.68 successful challenge was that the defendant was ordered to pay the claimant's costs of that challenge and they were the subject of a detailed assessment by Deputy Master Campbell on 12 May. The hearing of that assessment took place, initially, on 18 February 2020. On that occasion, the deputy master refused to allow the defendant to rely upon supplementary points of dispute served a few days earlier on 15 February. Those points of dispute related to the possible unenforceability of the CFA entered into between the claimant and its solicitors, DAC Beachcroft (whom I shall refer to as "DAC"), which governed the claimant's costs claim in relation to the s.68 application.

9 Although the deputy master refused permission to appeal, in respect of his refusal, on 17 June 2020, the Court of Appeal granted permission and stayed the order of the deputy master, on his assessment, which was in the net sum of £39,598, pending that appeal. That appeal has yet to be heard.

10 One might ask at first blush why that appeal has got anything to do with the arbitrator's award of costs, which is now permitted to be enforced by the enforcement order and which relates to different matters. The defendant's core reasoning is this. If the appeal succeeds, it will mean that either the Court of Appeal will have to address the supplementary points directly itself, which in my view is unlikely, or more likely, because of the procedural unfairness, the assessment will be remitted back to the deputy master, or possibly another master, to consider the supplementary points, to decide them and to see if that makes any difference to the assessment of costs. One possibility, which is the one which is seized upon by the defendant here, is that the supplementary points will succeed to the extent of showing that the CFA is invalid or unenforceable in some significant way. If so, says the defendant, that would bear upon the validity of the arbitrator's award of costs here, because there is at least a question mark as to whether those costs were, in fact, covered by the same CFA, even though the claimant has said that they were not; and that there would then be some route, in the light of a ruling in the defendant's favour by the Master about the CFA, that would, effectively, allow the defendant then to challenge the arbitrator's award, or perhaps the enforcement order, in such a way as to unpick it, with the possible result that this may prevent all or some of the £309,000 worth of costs being payable. Those are the serial strands of the defendant's argument.

11 Then, as the final point, it is said that, if the defendant had to pay the costs now, which the enforcement order requires them to do, there was a real prospect that, because of its own financial position, the claimant would not be in a position to pay them back if somewhere down the line it turned out that they were never due at all or in that amount. As against all of that, the claimant's position is that the stay application is hopeless and represents the latest in a line of attempts by the defendant to avoid its costs liabilities. The costs in question fell due to be paid to the solicitors, not by virtue of the CFA, but on the basis of bills of costs rendered pursuant to a standard retainer, on the basis of hours worked and hourly rates on the solicitors' standard retainer, which are, in fact, lower than the CFA rates.

12 Let me just at this point say a little about the law. This is not an appeal for a stay pending an appeal of the order in question. There is no pending appeal of O'Farrell J's order, nor could there be. Even if it was, the grant of permission to appeal does not automatically lead to a stay and any application for a stay pending appeal would usually have to show clearly that the balance of prejudice, absent the stay, would fall on the defendant. As I say, we are not in that territory here. In the case of the stay sought, in relation to a judgment which is not the subject of an appeal, although the parties have not referred me to any detailed case law in this, it is well known that, while the court undoubtedly has the power in its discretion to

order a stay, in the ordinary run of commercial cases, the grant of a stay, other than for a short period to allow for payment to be made, is exceptional. That is for the obvious reason that, under the rules, a judgment creditor is entitled to enforce his judgments immediately, or at least within 14 days.

13 Turning then to the facts as I find them and analyse them, as a result of the present application, the claimant has adduced two witness statements. The first, from one of the solicitors with conduct of the case, Sarah Davies, stated as follows in paras.18 to 22. She said that the assertion that the defendant did not know how much of the fees claimed - that is now the subject of the court's order - had been claimed under the agreement or if the CFA is valid (in the sense that it does not offend the indemnity principle) is not true. The sums awarded to Celtic by the arbitrator in the 23 October awards, which are the subject of enforcement action, are not claimed pursuant to the terms of the CFA. This is known by Knowles because

> "18.1. It had sight of and reviewed the detailed Bill of Costs in respect of both the Initial Issues and the Set-Off … 2 it has been confirmed in writing."

The 18.1 point here was a reference to the fact, among other things, as Mr Lyons reminded me today, that the hourly rate charged is lower than the hourly rate that has been charged for the CFA governed costs. In para.19, she says that this was costs under a standard retainer with applicable hourly rates assessed as reasonable for the arbitrator, so the CFA is irrelevant.

14 There is then a point about whether, even in respect of non-CFA costs, the indemnity principle was engaged. They refer to a letter which was, in fact, in respect of a different matter which came before me, where I asked for some confirmation and was sent a letter saying that the indemnity principle was observed. It also noted that the CFA, though not provided by way of disclosure to the defendant - and that was the claimant's right - had been available for inspection by the deputy master. He did inspect it and, in fact, made an assessment on lower hourly rates than those which were stated in the CFA.

15 Ms Davies then makes the rhetorical point , as it were, in her para.22 that it is difficult to see what is the significance of the defendant's appeal in respect of the deputy master's order so far as these costs are concerned.

16 The second witness statement adduced is from Mr Walsh, the director of the claimant, and he confirms the truth of Ms Davies' witness statement and he expressly confirms the evidence she gave about the different charging basis in the CFA (see para.5.3 thereof).

17 Notwithstanding that, the defendant maintained that it was not, in fact, clear that the CFA did not apply to the costs in issue. At the hearing of this application last Friday afternoon, the defendant relied upon an email from Ms Davies to the arbitrator dated 12 February 2021. It is true that this email made a reference in it to the CFA having limited scope but necessarily ongoing. However, a somewhat different point was made, in my judgment, for the first time before me and, in order to explain that, I shall now simply read the entirety of that email of 4 February from Ms Davies to the arbitrator.

> "We refer to your email timed at 14.52 on 4 February. As stated in our recent letter of 2 February, the CFA between Celtic and DACB includes recovery of the costs of the initial issues. The recovery of

> costs incurred in relation to Celtic's application for provisional relief falls within the scope of the initial issues. In the application for provisional relief Celtic sought an order on account of payment in respect of its costs in relation to the initial issues. The application was made by Celtic due to Knowles' failure to comply with its obligations pursuant to the arbitrator's award on liability for costs of the initial issues dated 5 October 2015. Had Knowles complied with its obligations, the application would not have been required. Secondly, for the sake of completeness, there is no date on which the CFA between Celtic and DAC be concluded. The CFA's scope is limited as explained but necessarily ongoing. Costs which fall outside the scope contained in the CFA are claimed subject to standard terms of engagement between Celtic and DACB."

18 Mr Hale in his submissions focused on two parts of this: the earlier part was where it was said that the CFA "includes recovery of the costs of the initial issues". The second was the reference to there being no date on which the CFA concluded and that its scope was limited.

19 He argued that the first point suggested that the CFA did govern the costs of the initial issues and also he says the counterclaim, which had been assessed and awarded on 23 October and which is the subject of this enforcement order. Secondly, he said that the implication of the second part was that the CFA had no date of execution, whereas, as set out in DAC's subsequent letter of 4 March, it said that it was executed on 17 May 2016. That letter actually answers the second argument based on 12 February email. The point was that the CFA had not come to an end and did not prescribe an end date but it was executed on a particular date. The letter also stated that the CFA was limited in scope and that the costs falling outside of it were claimed pursuant to DAC's standard terms of engagement.

20 In the light of the email, the explanation later on and what I have heard, I cannot see anything in the second point ie the notion that the scope of the CFA is such that it could and did govern the costs now in question before me.

21 As to the first, because that precise point had not been raised previously, and had not been dealt with as such by Ms Davies' witness statement (though she had indeed denied that the CFA covered the costs before me) and also because this submission was made without putting it in the context of the earlier emails of 4 February or the letter of 2 February, I considered it appropriate to allow the claimant to put in evidence to support and explain why Mr Lyons had said, on instructions, that this was a bad point. There is nothing in the suggestion that actually the claimant was aware of this point rumbling in the background, as it were, as Mr Lyons has explained to me today, the instructions he took, he took only when he saw what the point was that was now being raised by Mr Hale, in other words, in the course of the hearing on Friday and not before it.

22 Due to the lateness of the hour, that unfortunately necessitated the adjournment from Friday until today. Ms Davies duly produced a further witness statement and two exhibits. As she explained, the reference to the recovery of costs of the initial issues and subsequently the counterclaim, as opposed to the award by the arbitrator as to who should pay them and for how much, was a reference to the steps or proceedings taken in order to enforce, or to get the benefit of, the arbitrator's award. An arbitrator's award is not, for example, immediately enforceable in any final sense without an enforcement order from the court. In other words, the CFA does not govern the prior step of seeking the costs award from the arbitrator, following his determination of the initial issues in the counterclaim, and that is what resulted

in the 23 October order. That position had been made clear in the claimant's earlier letter of 2 February 2021. So far as that is concerned, apart from being consistent with the position of the claimant today as to the applicability of the CFA or not, there is a section headed

> "Stay of outstanding costs assessment. Notwithstanding the above submissions, in the event the arbitrator is minded to grant Knowles any stay of outstanding costs assessments, pending the outcome of its s.68 appeal".

That is the appeal against the order of the deputy master. Then the letter goes on to deal with that point. That makes it clear to me that the defendant had asked the arbitrator to stay some of his costs assessment. I infer that they include the costs assessments of 23 October, but, in any event, what that shows is that, given that the arbitrator subsequently considered that application and rejected it, it cannot be said that it is impossible for a defendant after an arbitrator has made a costs assessment to seek a stay thereof, because one way or another that is exactly what the defendant did. That has some relevance later on.

23 Pausing there, that letter itself shows that there is nothing in the first point said to arise out of 12 February 2021 letter. That is made good, if it needed to be made good, by the second witness statement of Ms Davies. She said in her para.8 that, in the letter it said,

> "Work beyond recovery of the costs of the initial issues are not claimed under the CFA. Non-CFA activity includes works relating to the setoff claim."

Then in para.10, she refers to the arbitrator's email of 4 February, which the later email was answering, where there had been queries raised and it refers to the fact that the arbitrator, talking about the costs of the provisional relief, said,

> "The former were claimed under the CFA, the latter will be based on the standard basis. I would be grateful if Celtic would please address the question as to the date when the CFA was concluded and works began to be claimed on the standard basis (i.e. when the CFA ended)".

That then gave rise to the point and the answer that it did not have an end date, but at para.11 Ms Davies makes the point that, therefore, the arbitrator was aware of Celtic's position about the limited scope of the CFA.

24 It goes on to say that the reason why there had been an application for provisional relief, which was in respect of an award of costs in principle made by the arbitrator back in 2015, was, indeed, being an order for the interim payment of some of the costs which had been ordered in principle by the arbitrator was because (not for the first time) the defendant had not paid any costs or made any offer to pay costs or matters of that kind.

25 Ms Davies then explained that the email maintains the previous position: that is what it meant to say, that it related to the recovery of the costs of the original issues and that they would answer any further queries.

26 Further, in the second witness statement, Ms Davies also exhibits the bill of costs for the initial issues, which shows that they were claimed on the standard terms of engagement as noted at para.10 of her witness statement.

27 Accordingly, as it seems to me, the new points made out of 12 February 2021 email do not, in my judgment, have any substance. Now, today Mr Hale in his submissions, having had sight of the further evidence, said that the scope still remained unclear. He said that the expression "recovery of costs" is still ambiguous. It could still mean the simple recovery of the costs in the sense of getting an award or an assessment of the costs and that is its natural meaning. But all of that, if it needed explanation, has been explained in the evidence of Ms Davies. The truth is that, if he is saying that it is ambiguous, that can only be because, while Ms Davies explains what it really means and explains what the true position is, she is not telling the truth. That is the only possible basis for the submission which is now being made, a submission which has to be treated with great caution where she is an officer of the court. She has now filed two witness statements on the point and the bills of costs have been signed by a solicitor which, under normal circumstances following the rule of *Bailey*, cannot be gone behind.

28 Mr Hale refers to the reference to recovery of costs in Mr Kemp's witness statement, which comes from January 2019 and that he must have thought that it refers to some further costs in the arbitration and also the recovery of costs. That is in a different context much earlier on and is not dealing with the point that we are dealing with now. So I do not think that anything serious can be read from that.

29 I have already explained why I take the view that the 12 February 2021 email point that was taken on Friday was not the same as the point that had been mentioned in, for example, para.4 of Mr Rees' witness statement. There is nothing in the point that, when Mr Lyons had to deal with this on the hoof, as it were, on Friday, he thought that the original instructions, which were having to be sent by messages, were that there was a "not" that should have been in the email. In one sense, that would make sense now that we understand what "recovery of costs" truly means, but, in any event, he was having to take instructions quickly. Nothing turns on that.

30 In reply, Mr Hale said that it was not possible to compare the bill of costs or he did not have them in front of him, but the simple point which had been made previously was that they are different hourly rates, depending whether they are governed by the CFA or not.

31 As to the fact that no application was made to set aside the enforcement order within the 14 days that was permitted, the defendant said that they preferred to go down the route of seeking a stay. If that is the view they took, that is the view they took, although it does not seem to me that, if they were right about all of this, it would mean that there was no prospect of applying to set aside an order which, after all, had the purpose of enforcing the underlying costs order by the arbitrator.

32 In my judgment, the inferences which the defendant invites me to draw are really not there and they do not begin to suggest that there is any real doubt as to the claimant's contention that the CFA did not govern the costs of the initial issues.

33 So far as the counterclaim is concerned, a second new matter, as I saw it, raised by the defendant and said to support the notion that the CFA may have governed the relevant costs involved in the counterclaim, was para.6 of the arbitrator's costs assessment at p.150. There is a long section in para.6 where it is said that

> "Previously in this long reference, Celtic has claimed costs on the basis of a CFA [and that was proved] and Knowles is presently

pursuing an action at court in which, *inter alia*, it seeks disclosure of the details of that CFA."

That was also a step being taken, but then the defendant asserted many hours had been expended and were being claimed after 1 May 2019 and numerous points were taken on the schedule of costs, the bill of costs and all the rest of it. But, reading that paragraph as a whole, I simply do not see how that can be said to make any sort of suggestion that costs, either before or after a certain date in relation to the counterclaim, were being sought pursuant to the CFA. When I asked Mr Hale about it, he accepted that that was not something that expressly arose in that paragraph. I do not see how it really arose at all.

34 For the sake of completeness, I should also refer to paras.29 and 30 of the arbitrator's costs assessment on the initial issues. One of the separate claims for costs or losses made was by the claimant on the basis that, when it had to pay for disbursements, it had to do so in sterling, but it traded in Euros, and, because of the currency market, that exposed it to losses as a result of the exchange rate deficit. That was accepted, in principle, but the arbitrator declined to make any award where there was no proof of when particular disbursements were paid, which was obviously important. He said that he had seen no evidence that the claimant paid DAC's fees and reminded himself that he had been told that DAC had been instructed on a CFA so costs may not have been paid on any ongoing basis. That remark in passing, while made in the context of what has to be shown in relation to the exchange rate claims, is hardly evidence that the arbitrator thought or there was any real evidence that the costs of the initial issues were themselves subject to the CFA.

35 Finally, on this aspect of the application, and not unimportantly, there is the witness statement of Ms Davies, which is accompanied by statements of truth - and I have indicated that there is no basis to go behind that here, as I see it - and there is, of course, the witness statement of Mr Walsh. Whilst it is true that the claimant could have disclosed the entirety of the CFA to show what its direct scope was, I accept, as Mr Lyons submitted, that, as it is privileged, there is no obligation to do so and no inference can or should be drawn from its non-disclosure, as in fact the arbitrator accepted. Further, a signature on a bill of costs is usually taken as final. Further, in circumstances where, as Jefford J had found, while the claimant has always abided by orders of the court and the arbitrator, the defendant on numerous occasions has not, in what appear to be serial attempts to avoid paying any costs, I think that the claimant was perfectly entitled to take the view that it should not, as it were, "feed" the defendant's appetite for challenging the claimant's costs entitlement in the way in which it has to date.

36 Dealing, therefore, with the foundation of the stay application, which is the possible effect of the current appeal on the costs award before me, for all the reasons that I have given, the present limb of the stay argument is utterly speculative and indeed groundless. The late introduction of the new argument based on 12 February email and the counterclaim costs only support the notion that the defendant appears to have been scrambling around to find a way to avoid paying these costs.

37 Without the basis for this link from the CFA to these costs, the application for a stay is doomed to fail. Without more, it is made worse by the various imponderables of the other elements of it which it is said might ultimately lead somehow, and at some time, to the defendant being able to upset the costs assessments of the arbitrator in October 2020 or the enforcement order from February of this year. All of which seem to be not only speculative but a very long way down the road.

38 All of that leaves is what is now an unnecessary contention, because it is academic, which is that the claimant will not or might not repay any costs if they were paid now and, if it turns out later that the costs were not payable, that the defendant could be in receipt of an order to have them refunded to it.

39 Although it is academic, the point has been argued before me. Let me simply say this. I do not accept that the claimant would not pay costs if it could. It has complied with all costs orders of the court and the arbitrator to date. As to whether it might find itself unable to do so, the argument that is made is that its principal asset lies in its 50 per cent interest in a joint venture, which has recently been revalued at £18 million. That is in terms of the value of the intellectual property rights in question and where the accounts show net assets of £9 million. There is very little cash in the bank at the moment and last year I think that it had made a loss, but the fact is that the claimant and, indeed, the joint venture of which it is a part are going concerns and, more than that, any question of any ability to repay is, in my judgment, if it ever were to come about, a very long way down the line indeed and it is impossible to predict what the position might be then. There is no suggestion of an impending insolvency. Mr Hale is right to say that at para.69 of Mr Kemp's witness statement, going back to January 2019, he postulated a possible insolvency if the various costs orders in favour of the claimant were not made, but that was overcome and that was then and this is now, some two years later. Therefore, in my judgment, the notion that, if sums were paid now, there is a real prospect to the prejudice of the defendant that they would not be capable of being repaid or that the claimant simply would not repay them is not one which I regard as a serious proposition.

40 On that basis, and even if the application for a stay was not required to be exceptional as I believe it to be, but, even on a simple balancing exercise and the exercise of my discretion, there is no basis whatsoever for the grant of any stay. There is, in truth, nothing in it.

41 Accordingly, I dismiss the application.

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CERTIFICATE

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