Neutral Citation Number: **[2023] EWHC 2888 (Comm)**

Case No: **CL-2015-000396**

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **1 November 2023**

Before :

Mrs Justice Cockerill

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Between :

Hulley Enterprises Limited and others	**Group 1**
- and -	
The Russian Federation	**Defendant**

- -
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Jonathan Crow and David Peters (instructed by **Stephenson Harwood LLP**) for the **Group 1**

Hearing dates: **1st November 2023**

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APPROVED RULING

Mrs Justice Cockerill **Wednesday, 1 November 2023**
(**11:19** am)

Ruling by **MRS JUSTICE COCKERILL**

1. The permission to appeal application is made both on the "real prospect of success" and "some other compelling reason" bases. As to the latter, some other compelling reason, I do not see this case as that vanishingly rare case where permission should be given by this court on this ground. That is a ground which is almost inevitably best looked at by the Court of Appeal, so I'm primarily going turn you down on some other compelling reason and consider in more detail the question of real prospect of success.

2. There are six grounds in which there is some overlap, grounds 1, 2 and 3 effectively all go to the first issue, and grounds 1 and 2 particularly dovetail together as covering issue estoppel regarding a foreign state. This is the area where one might most easily see the some other compelling reason argument engaging, because it is the first case which explicitly finds that issue estoppel is available against a foreign state, which is the conclusion which I have reached.

3. On the question of real prospect of success, however, I do not regard it as a point where there is real prospect of success. It is a new point in the sense that there has been no previous authority which has specifically decided it, but that does not mean that the point is arguable, or one on which there is a real prospect of success. This is not, as the Russian Federation would say, a decision which is actually grounded in peripheral comments in two other cases. It is a decision grounded in fundamental principle and, if they will forgive me for saying so, logic.

4. The context in which the statements are made in various authorities which border on this point are ones made in a context which effectively show that the point is assumed. That position is backed up by the structure within which the argument sits. There is nothing in the State Immunity Act which says it disapplies English law principles, the fact of the importance of state immunity which I have explicitly acknowledged is neither here nor

there, nor is the comprehensive code aspect, in circumstances where my decision is effectively that there is nothing in the State Immunity Act which says that English law principles do not apply.

5. To the extent that the application is grounded in the suggestion that my approach avoids a State Immunity Act decision, that is just simply wrong because the decision is clearly made.

6. Mr Qureshi has, of course, availed himself of the exchange before Mr Justice Butcher as to the possibility of an appeal. I do not regard that as tying my hands in any way, shape or form. Mr Justice Butcher had not yet heard the arguments. Mr Crow, to the extent that he responded to Mr Justice Butcher's suggestions, had not yet argued them.

7. I have heard the arguments, and I have reasoned through a judgment, and at the end of that I do regard this as a more than usually clear case in terms of the result. I do not consider that there is a real prospect of the Court of Appeal reaching a different view on this point, so on real prospect of success I refuse permission. That being the case I would not grant permission on the some other compelling reason basis as it would be pointless and there is now a clear decision in the form of my own judgment.

8. The same really applies to ground 3, which is the Civil Jurisdiction and Judgments Act. This is essentially part of the first overarching point, and a side point to grounds 1 and 2. There is no real prospect of success. The Russian Federation's approach to this point continues not to understand the way that section 31 feeds into the analysis.

9. So far as ground 4 is concerned, that is special circumstances. On this also I regard there as being no real prospect of success. I note, by way of parenthesis, that this is a point which was one which I raised and was not specifically argued by the Russian Federation in front of me. But in any event, the approach which is taken to it is not to say that it is an error of law, and if it were, given the authority which I have cited, I have no doubt that there is no real prospect of success on this. Special circumstances is a very narrow

window. Two subheadings are relied on in relation to that: the first is fraud -- that goes to case management, how one deals with this going forward, not to special circumstances. It is logically a separate question.

10. As regards the second point, the so called real probability of the reference to the CJEU, now relocated as a subhead to this argument (rather than as it was deployed before me as one of major grounds of argument itself), the argument as put in the grounds of appeal effectively backs off from the Dutch law arguments which were made in front of me, and relies, really, on res inter alios acta, that is the Paris *Cour d'Appel* and the Luxembourg court positions. That is completely irrelevant to the law on whether there is a real possibility of a CJEU reference in these proceedings. It also does not actually engage with the argument which was deployed on this point before me, thereby tacitly conceding the Dutch law point which I actually decided.

11. Ground 5, treaty law. Again, that was not a head which was fully argued before me, and no error of law is identified. There is no real prospect of success on this ground. The arguments here appear to be, are a repeat of the ones partially argued before me; which I have had no difficulty in dismissing in the judgment.

12. On Ground 6, the issue as to the expert, this is one which does not affect the conclusion, and so there is no real prospect of success because real prospect of success has to go to outcome, not to drafting of the judgment.

13. I did make some observations in relation to Mr Cornegor. Those observations were plainly not determinative of my approach to his evidence which approach, as I have noted, does not actually seem to be challenged by the other grounds of appeal. I tend to agree with Mr Crow's submission that I was scrupulous to consider the extent to which there was anything in this point as to lack of impartiality, and moderated the conclusions from what I was urged to by him.

14. In any event having reached the conclusions I reached on the relative status of the experts in terms of neutrality and assisting the court, I was also scrupulous to look at the content of the arguments and to say that regardless of what I had to say about his position, I considered him as having the worst of the argument analytically, and that the decision which I made was made by reference to analysis of the arguments. There is then, following from that, detailed analysis of the Dutch law in the judgment which is not dealt with. Therefore, this is a point (a) which would make no difference and (b) on which no real ground going to error is discernible. There is no real prospect of success.

15. I therefore conclude that overall there is no real prospect of success on appeal, and while the Court of Appeal are obviously the best people to think about some other compelling reason, given the fairly exhaustive conclusion on no real prospect of success I would have no difficulty myself in saying that this is a case where there is no other compelling reason to give permission. Therefore I refuse permission to appeal.

16. In relation to costs, principle and the principle of detailed assessment is not contentious. Issue 1, payment on account, claimants seek £1.8 million, that is 45 per cent, similar to what was ordered by Mr Justice Henshaw. The defendants say even 45 per cent, which is below the "usual" benchmark for payment on account of 60 per cent, and even bearing in mind that the court does not have to come down below what is likely to be awarded, the defendants say it is way too high. They point me to previous costs, for example, this is higher than for a previous four-day hearing, and by reference to what the defendants say are inadequate summaries with very little, if any, narrative, and where there are, they would say, apparent anomalies, such as the extent of Stephenson Harwood's costs in relation to expert evidence. They call the material as a basis for making a decision on payment on account in such a large amount "patently inadequate" and suggest that if I were to make an order it should not be above, say, £450,00, maximum £550,000.

17. On this, the question is not a scientific one, as Mr Crow points out. However, the position that I am in does feed into the sense that there must, inevitably, be a very significant reduction on detailed assessment where an eagle eye is taken to such things as

chargeable rates, number of people operating, etc, etc. In a situation where the summaries of costs are not even of the level of detail that one would put forward, say for a summary assessment, which would enable me to make a more informed assessment, I am minded to take a somewhat bigger haircut to the figures than I would otherwise.

18. Having said that, we are looking at summaries being put forward by reputable solicitors, and we are not looking at a situation where it would be remotely appropriate to say there is padding, or anything like that. What we are looking at is proportionality issues, and in the light of that, once one has already brought it down to 45 per cent, there is only so much further that it is appropriate, it seems to me, to go in reducing for making a payment on account, and therefore I am going to order payment on account of £1.5 million, subject to the point about the possibility of making the payment.

19. The defendants say that they could only make a payment of £550,000 because of difficulty in meeting an order. While I have carefully read Mr Andreev's statement, and I have listened to what Mr Qureshi has to say I'm not minded to accede to the submission that I should not make that order for a payment on account of £1.5 million because of difficulties in making payment.

20. The fact that there may be difficulties are not a reason not to make an order for payment on account. Mr Crow says it would be perverse for the Russian Federation to invoke sanctions difficulties to put it in a better position than other defendants. Well, that may or may not be the case. I would prefer, and I do put this decision on the basis of the evidence before me. The truth is that in relation to difficulties which reach back some time, such as the statutory provisions and the difficulties since the Ukraine conflict has begun, these are all matters which have been around in a period of time when such orders have been made.

21. I am not satisfied that I have material which would enable me to conclude that for any of those reasons it is not possible for the Russian Federation to make payment. There is no certainty, and indeed there are indications that there are routes, for example through The

Netherlands, which would enable payment to be made. That certainly is consistent with the position in relation to past orders which have been made.

22. Nor is there evidence of anything significantly changing in the light of the Court of Appeal's interesting decision in the *Mints* case. Overall the evidence before me is not of an order which would satisfy the kind of requirements that one would have in place if somebody were to say "stifling" in the context of security for costs and so forth. The position is, as I have said, simply an uncertainty and evidence of difficulties. In the absence of evidence which can properly satisfy me that the Russian Federation cannot pay any interim payment which I make above £550,000, I would conclude it would be wrong to accede to the submission that they should not be made to pay any amount above that.

23. The reality is that if the Russian Federation is unable to comply with the order that I make, it can come back to court, either for an extension, if it genuinely cannot pay, and it has evidence to that effect, or to respond to any application made against it if it does not pay.

24. Certainly in terms of the structuring of the payment, the £550,000 which is in court should be paid out towards the interim payment on account. The remainder of the payment will have to be found by the Russian Federation itself. I will go this far towards them, that in the light of the fact that there is evidence of difficulties, and that life is not as straightforward as it might otherwise be, I will give 28 days.

25. Interest on costs. What is sought is interest on costs, 1 per cent over base by reference to *Nova Productions*. Mr Crow says that there is no reason not to order that, and it is now fairly standard. The defendants make two points in relation to this. It is far from clear what the costs relate to, effectively reiterating the points about the opacity of the schedules but interest, of course, would only run on recoverable costs. The more substantial point is that interest should not run during a stay by consent, and Mr Crow submits it does not follow that interest should not run. I can see an argument that while

the delay is at least in part because of the consent of the claimants, it might be in some circumstances inappropriate to exercise the discretion to order interest on costs. However, the reason for the stay is effectively one which lies at the door of the Russian Federation in terms of the various challenges which have been made, the stay had to be put in place while this was played out. It seems to me that in those circumstances, where there has, as a result, been a very long delay, the usual consequence as to interest on costs should follow.

26. I then turn to the case management aspect. We are in an interesting position in that there was a stay by the order of MrJustice Leggatt on 8 June 2016. That order said the proceedings are stayed from the date of this order, the parties each have liberty to apply without showing change of circumstances to lift the stay following the hand down of the Court of Appeal of The Hague, and matters have since moved on, obviously, in the light of what has happened since then.

27. The submissions are whether I should effectively leave the position as being that there needs to be an application to lift the stay on enforcement after the final determination in The Netherlands, or whether, as Mr Crow urges me, I should proactively case manage this. It seems to me that purely in practical terms the appropriate thing is to put this now quite stale piece of litigation, which has just, after however many years it is, reached the point where the jurisdiction application is capable of being determined, in a position where it can move forward as expeditiously as possible once there is a determination in The Netherlands.

28. I do not anticipate any matters reaching a conclusion in any way before the conclusion of proceedings in The Netherlands, but the parties should be put in a position where they can move forward once that is done. Therefore, I am going to accede to Mr Crow's submissions. Part of the reason for that, I should add, is that it is inevitable in a case of this sort, with the skill and verve which is devoted to every possible point, and the huge amounts in issue, that the next stage will involve a substantial hearing. Regrettably this court is not in a position to give a hearing of one day or more at the drop of a hat, and

therefore to the extent there is plainly going to need to be a hearing of at least one day to deal with how this moves forward, we should be in a position where, absent things being snarled up by any appeal on jurisdiction, once the determination has been reached in The Netherlands, we can come back to court and plot a course forward.