[2023 Gib LR 556]

MANSION (GIBRALTAR) LIMITED and ONISAC LIMITED v. MANASCO and KM ACCOUNTANTS LIMITED

SUPREME COURT (Dudley, C.J.): July 11th, 2023

2023/GSC/027

Injunctions—freezing orders—costs—costs of application for interim injunction usually reserved where interim injunction sought based on balance of convenience and to "hold the ring" pending trial—freezing orders materially different—purpose of relief to prevent defendant from thwarting judgment by wrongfully dissipating or hiding assets—possible to tell in most cases who is winner and loser on return date

The claimants applied for a freezing order.

The claimants' application for a freezing order was resisted by the first defendant who accepted that the good arguable case threshold test was met but claimed there was no real risk of dissipation. The court granted the relief sought. The claimants sought an order that the first defendant pay their costs of the application for the freezing order. The first defendant contended that, as with interim injunctions, the appropriate order was for costs to be reserved.

Held, judgment as follows:

(1) It was appropriate to deal with the costs of the application for the freezing order at this stage. The making of freezing orders was different from the general position where interim injunctions were sought based on the balance of convenience and to "hold the ring" pending trial. Where the purpose of an interim injunction was to hold the ring until trial, the costs of the application would usually be reserved. However, the holding of the ring in a freezing order was materially different from that of interim injunction cases. Particularly in the present case where the claimants asserted no propriety claim when the freezing order was sought, the purpose of the relief was to prevent a defendant from thwarting any judgment which might be obtained by wrongfully dissipating or hiding assets against which the judgment could be enforced. That relief did not afford a claimant security but sought to prevent a defendant from evading justice by the improper dissipation of assets. It was possible to tell in most cases who the winner and loser was on a return date in a way that was often not possible on an interim injunction (paras. 12–15).

(2) The general rule was that the unsuccessful party should pay the costs of the successful party. The claimants, having succeeded, were entitled to payment of their costs of and incidental to the application for the freezing order to be assessed if not agreed. No reason had been advanced as to why a reasonable sum should not be paid pursuant to CPR r.44.2(8). The claimants' statement of costs totalled £145,505. There would have to be an assessment of the hours spent. At this stage, a reasonable sum on account of costs was £90,000, which was to be paid within 28 days (paras. 16–19).

Cases cited:
(1) *Al Assam* v. *Tsouvelekakis*, [2022] EWHC 2137 (Ch), considered.
(2) *American Cyanamid Co*. v. *Ethicon Ltd*., [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504; [1975] F.S.R. 101; [1975] R.P.C. 513, considered.
(3) *Bravo* v. *Amerisur Resources plc*, [2020] EWHC 2279 (QB); [2020] Costs L.R. 1329, considered.
(4) *Excalibur Ventures LLC* v. *Texas Keystone Inc.*, [2015] EWHC 566 (Comm), considered.
(5) *Koza Ltd.* v. *Koza Altin Isletmeleri AS*, [2020] EWCA Civ 1263; [2020] Costs L.R. 1479, considered.
(6) *Kumar* v. *Sharma*, [2022] EWHC 1008 (Ch); [2022] Costs L.R. 1029, considered.
(7) *Picnic at Ascot* v. *Derigs*, [2000] EWHC 1568 (Ch); [2001] FSR 2, referred to.
(8) *Vneshprombank LLC* v. *Bedzhamov*, [2019] EWCA Civ 1992, considered.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.44.2(8): The relevant terms of this provision are set out at para. 17.

J. Montado and *J. Castle* (instructed by Isolas LLP) for the claimants;
C. Allan and *P. Dumas* (instructed by Peter Caruana & Co.) for the first defendant.

1 **DUDLEY, C.J.:** This is the judgment in respect of costs sought by the claimants ("Mansion") arising from an application for a freezing order following a two days *inter partes* hearing which was resisted by the first defendant ("KM"). The position adopted by KM was that whilst accepting that the "good arguable case" threshold test was met, there was no real risk of dissipation.

2 On February 21st, 2023 I handed down a judgment setting out the reasons for the grant of the relief sought. At the time of the hand down the parties were not in a position to address me as to the precise terms of the order and in relation to costs. On the basis of certain undertakings provided by KM the matter was adjourned. It next came before me on March 22nd,

2023 when I made certain determinations in respect of KM's ordinary living and business expenses. Decisive in those determinations was my reliance upon *Vneshprombank LLC* v. *Bedzhamov* (8) in which it was held that the court was concerned not with whether the living expenses were reasonable in some objective sense, only with whether the expenses were of a nature and amount which had been ordinarily incurred by the defendant in the past.

3 As regards costs, Mr. Montado sought an order that KM pay Mansion's costs whilst Mr. Allan contended that the appropriate order was for costs to be reserved.

4 It is trite that the basic legal principle is that the costs of and incidental to all proceedings are a matter of judicial discretion. The approach to be taken when dealing with the costs of interim injunctions is referred to in the *White Book 2023*, para. 44.2.15.1, at 1371, as follows:

> "Where the purpose of an interim injunction is to 'hold the ring' until trial, the costs of the application will usually be reserved: *Richardson v Desquenne et Giral UK Ltd* [1999] C.P.L.R 744; [2001] F.S.R. 1; *Picnic at Ascot v Kalus Derigs* [2001] F.S.R. 2. The *Desquenne* principle overrides the usual rule that the unsuccessful party bears the costs because, in a case where the injunction is granted on the balance of convenience, at that stage there is no winner or loser . . . Where however the injunction is granted not merely on the balance of convenience and the issues considered on the application will not be revisited in the substantive proceedings, if there is a winner and a loser on those issues, the loser should pay the winner's costs: *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1263."

5 *Koza Ltd.* v. *Koza Altin Isletmeleri AS* (5) was not a case which involved a freezing order. The question of what costs order should be made in relation to an application for a freezing injunction was considered in *Bravo* v. *Amerisur Resources plc* (3). Martin Spencer, J. in a detailed judgment in which he reviewed the authorities dealing with the costs of interim injunctions and noting ([2020] EWHC 2279 (Q.B.), at para. 47) the "surprisingly little authority" in relation to the point in dispute, referred (*ibid.*, at para. 51) to the judgment of Neuberger, J. as he then was in *Picnic at Ascot* v. *Derigs* (7) and (*ibid.* at para. 52) examined the difference between freezing orders and other injunctions. He said:

> "51. The[n] Neuberger J went on to say this:
>
> > 'One can see the force of that, particularly when one bears in mind that the balance of convenience will often be determined by reference to facts which may be contested, and the court may at trial conclude that it had been persuaded to grant an interlocutory injunction on the basis of assumed facts which turn

> out to be inaccurate, or even in the context of a claim which should never have been brought.'
>
> 52. It seems to me that this is enough to show that the decision in *Picnic at Ascot* is not wholly apposite claims for freezing orders where the balance of convenience is not an issue, and where in relation to the merits of the case the court has regard to the question of whether there is a good arguable case on behalf of the claimants or not. That is sufficient for the court to determine whether a freezing order should be made, and even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. On the contrary, those two findings are wholly consistent with each other, or maybe wholly consistent with each other. Nor is there any reference to the balance of convenience. The question is whether it is just and convenient to make an order."

Thereafter (*ibid.*, at para. 53) he went on to conclude that:

> "the regime for the making of Freezing orders is different to the general position where interim injunctions are sought based upon balance of convenience and holding the ring pending the trial. There are, obviously, overlapping features, holding the ring being one of them. The purpose of a freezing injunction is to avoid a successful claimant being unable to enjoy the fruits of his success because there are no assets left against which the judgment can be enforced, but that is a different kind of holding of the ring to that which is involved in the usual interim injunction and balance of convenience type case."

Martin Spencer, J. went on to determine that it was appropriate to deal with the costs at the time, rather than awaiting the outcome of the trial.

6 The question of what costs orders should be made in a freezing order application has subsequently been considered in another two English High Court decisions, namely *Kumar* v. *Sharma* (6) and *Al Assam* v. *Tsouvelekakis* (1).

7 In *Kumar* v. *Sharma,* Mr. Jonathan Hilliard, K.C. (sitting as a judge of the English High Court) dealing with an application relating to the costs of the return date for the continuation of a freezing injunction followed *Bravo* and said ([2022] EWHC 1008 (Ch), at para. 12):

> "12. Starting with the costs of the return date:
>
> (1) As explained in *Bravo*, and as submitted by Mr Sharafi, a freezing order does not hold the ring in the same sense as other types of interim injunctions often do.

(2) It is a choice for a defendant as to whether to resist the continuance of a freezing order and cause the costs of the return date to be incurred.

(3) There are clear tests for whether a freezing order should be granted and continued, and those are different to the tests for whether the claim should succeed at trial.

(4) It follows that it is possible to tell, in most cases, who the winner and loser is on a return date in a way that it is often not on an interim injunction that truly holds the ring on an interim basis until trial.

(5) Therefore, the fact that, here, the evidence relating to good arguable case will overlap or be the same as the evidence relevant at trial to whether the claim succeeds on the facts is not, to my mind, decisive. If the defendant chooses to oppose the continuation of the freezing order, it needs to prevent the claimant demonstrating that there is a good arguable case if that is the ground of challenge it chooses to mount on the return date, and if the defendant fails, then it has failed on the return date on that element of the case irrespective of what happens at trial, and that, to my mind, is consistent with the reasoning in *Bravo*.

(6) By analogy, where, for example, a defendant brings an application for reverse summary judgment against the claimant and fails, it is no answer to the claimant's claim for costs that the defendant may ultimately be the successful party at trial on the balance of probabilities.

(7) Indeed, were it otherwise, a defendant would have a free shot at opposing a freezing order continuance on a return date on the good arguable case ground, knowing that it would not have to bear costs if it ultimately succeeded at trial, or unless and until the trial took place and had been decided.

(8) Further, I am able to deal with the issues of full and frank disclosure and the duty of fair presentation now and, to my mind, I am in a considerably better position to do so than the trial judge.

(9) I have taken into account the fact that the matters dealt with at the return date included the question of the value of Saka Maka 2 Limited and that various allegations were made about the conduct of Mr Kumar, as Mr Walters put to me. However, both of those issues arose in relation to whether the ordinary requirements for a freezing order were satisfied.

Therefore, I consider, as in the three cases to which I have referred, that the costs of the return date should be dealt with now."

8 In *Al Assam*, HH Judge Davis-White, K.C. (sitting as a judge of the High Court) took a contrary view. He also reviewed the authorities and said ([2022] EWHC 2137 (Ch), at paras. 251–252):

"251. In both *American Cyanamid* applications and freezing order applications (although I accept with slightly different effect and operation) the effect of the order is to hold the ring. If the applicant in either case loses on the merits at trial then the interim injunction will be discharged. Indeed, in such circumstances, an inquiry as to damages may be ordered on the cross-undertaking usually given by the applicant for the original interim order.

252. As regards interim injunctions granted under the *American Cyanamid* principle, it is no answer to an application for the costs of the application to be reserved to say that the respondent failed to establish that there was not a serious issue to be tried and that whatever the position at trial the respondent has failed on the assessment of the merits test as they stand and apply at the interim stage. Indeed, that was the flawed approach adopted in cases such as *Melford Capital Partners.* The reason is because the claim has not then been established. In my judgment, the same is true in principle as regards a freezing injunction. The court has simply decided that there is an arguable claim, not that the claim succeeds. If the claim fails at trial, then the freezing injunction should (with the benefit of hindsight) not have been made."

Then (*ibid.*, at para. 254):

"254. Once one gets to the balance of convenience under the *American Cyanamid* test, it is because there is a serious issue to be tried. The question of the balance of convenience is in many cases not revisited at trial. It is the merits of the underlying claim which are definitely revisited. I do of course accept that features considered under the heading 'balance of convenience' may have further light thrown upon them by the trial process and decision. The passage in Neuberger J's judgment that I have cited refers not only to the trial shining a light on factors that go to the balance of convenience but also the possibility that it demonstrates that the claim should not have been brought. This confirms my view that the merits not being determined is a reason why costs are usually reserved (at least as a starting point). There is also the following passage in his judgment which appears to me to apply equally to the making of freezing injunctions:

'(7) . . . On the other hand, if the court is faced with disputed facts, and believes the claimant's version of the facts is more

> likely to be accepted, it may be dangerous to take that into account in the claimant's favour when deciding what to do about costs. It is obviously conceivable that at trial the court's preliminary, even its strongly held, view as to the likely outcome of the dispute on fact may turn out to be wrong. It would be adding insult to injury if an unfavourable order for costs is made against the defendant, in addition to the injunction being granted at the interlocutory stage, on the basis of a wrong (as it turned out) view of the facts by the court.'
>
> I do not see that statement as limited to disputes of fact regarding balance of convenience issues and consider that it also encompasses disputes as to the underlying claim itself."

9 Judge Davis-White, K.C. (*ibid.*, at paras. 258–263) reviewed the nine considerations relied upon by Mr. Hilliard, K.C. In short he dealt with considerations (1), (3), (4) and (5) by reference to the passages I have quoted, concluding that the tests under *American Cyanamid Co.* v. *Ethicon* (2) and for a freezing order are different but sufficiently analogous such that they should have the same starting costs position.

10 In respect of considerations (2) and (7) which touch upon freezing orders at times involving *ex parte* and *inter partes* hearings, the principal answer provided by Judge Davis-White, K.C. is that the same procedural process can appertain to *American Cyanamid* cases and that yet the starting point in those cases is that costs will be reserved. Whilst as regards consideration (8) he observed that a costs order in respect of an issue that will not be revisited need not impact upon what the costs of the freezing order should be, in relation to consideration (6) he did not accept that the analogy with a reverse summary judgment application was apt, on the basis that a reverse summary judgment application is determined once and for all, in contrast to an interim decision that holds the ring until trial. Likely uncontroversially he observed that consideration (9) does not take matters any further.

11 Premised on that that analysis, Judge Davis-White, K.C. went on to conclude that the general approach to costs which applies in the *American Cyanamid* context should be applied in applications for freezing orders.

12 It seems to me that at the core of the debate is the extent to which a freezing order is analogous to an *American Cyanamid* injunction. For my part I respectfully adopt the analysis of Spencer, J. in *Koza* (5), at his para. 53 (at para. 5 above). That the holding of the ring in a freezing order is materially different from that of *American Cyanamid* cases is evidenced by *Vneshprombank LLC* v. *Bedzhamov* (8) where Males, L.J., restating well established principles, said ([2019] EWCA Civ 1992, at para. 68):

> "The purpose of the freezing order jurisdiction is not to provide a claimant with security but to prevent a defendant from taking steps outside the ordinary course which will have the effect of rendering any judgment unenforceable; subject to this, a defendant should be entitled to do as he wishes with his own money."

13 Particularly as in the present case, where Mansion asserted no proprietary claim when it sought the freezing order, the purpose of the relief is to prevent a respondent from thwarting any judgment which may be obtained by wrongfully dissipating or hiding assets against which the judgment could be enforced. That relief does not afford a claimant security but seeks to prevent a defendant from evading justice by the improper dissipation of assets. In my judgment that is materially different from an *American Cyanamid* holding of the ring injunction and I respectfully adopt considerations (1), (3) and (4) in *Kumar* v. *Sharma* (6). As regards consideration (5), the position in this case is possibly more clear cut in that the respondent accepted that the "good arguable case" threshold test was met and what fell for determination was essentially whether a real risk of dissipation was made out. That is not likely a matter which will fall for consideration at trial, save possibly to the extent that it may go towards credibility.

14 I would also observe that in my view the analogy with a reverse summary judgment at consideration (6) is apposite. The distinction applied by Judge Davis-White, K.C. ([2022] EWHC 2137 (Ch), at para. 259) that "[a] reverse summary judgment application is determined once and for all, it is not in any sense an interim decision that holds the fort until trial in any sense" is in my respectful view a distinction without a difference. A reverse summary judgment is not an application which would be revisited but neither is an application for a freezing order, other than possibly to vary the ordinary living and business expenses. The other considerations identified in *Kumar* v. *Sharma* are not engaged in this case.

15 In my judgment, for these reasons, it is appropriate to deal with the costs of the application for the freezing order at this stage.

16 The general rule is that the unsuccessful party should pay the costs of the successful party. Mansion having succeeded is entitled to payment of its costs of and incidental to the application for the freezing order to be assessed if not agreed.

17 CPR r.44.2(8) provides:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

No reason is advanced as to why a reasonable sum should not be paid.

18 In *Excalibur Ventures LLC* v. *Texas Keystone Inc.* (4), Christopher Clarke, L.J. ([2015] EWHC 566 (Comm), at para. 23) dealt with what a reasonable amount is as follows:

> "What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

19 Mansion's statement of costs gives a grand total of £145,505. The hourly rates claimed in respect of Mr. Montado and Mr. Castle at £350 and £150 per hour respectively, are in the context of their years of experience and the nature of these proceedings appropriate. There will of course have to be an assessment as regards the hours spent. Of the total claimed, £80,000 is attributable to Mr. Malek, K.C.'s fee. At first blush it is a very significant sum for an application which was relatively straightforward and which is in the context of litigation which does not fall to be described as very heavy commercial litigation. It may be that someone of his level of experience was not required and that instructing him, rather than a senior junior, was not proportionate. That KM also instructed a very senior King's Counsel is not necessarily a complete answer. But that of course is a matter that may fall to be considered at a detailed assessment. In my judgment at this stage a reasonable sum on account of costs is £90,000 which is to be paid within 28 days.

Orders accordingly.