Case No: CL-2019-000303; CL-2020-000304

Neutral Citation Number: [2022] EWHC 2702 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF SECTION 44 OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF SECTION 37 OF THE SENIOR COURTS ACT 1981

Rolls Building
Fetter Lane
London,
EC4A 1NL

12 September 2022

Before :

MRS JUSTICE COCKERILL

- -

Between :

DEUTSCHE BANK AG (LONDON BRANCH) **Claimant**

- and -

CENTRAL BANK OF VENEZUELA **Defendant**

-and-

RECEIVERS

Receivers

And between:

BANCO CENTRAL DE VENEZUELA

Claimant

-and-

THE GOVERNOR & COMPANY OF THE BANK OF ENGLAND

Defendant

-and-

(1) THE "MADURO BOARD"

(2) THE "GUAIDÓ BOARD"

Stakeholder Claimants

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Andrew Fulton KC and Mark Tushingham (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) for the **GUAIDÓ BOARD**
Richard Lissack KC, Vaughan Lowe KC, Brian Dye, Jonathan Miller, Daniel Edmonds and Jacob Turner (instructed by **Zaiwalla & Co**) for the **MADURO BOARD**

Hearing on documents

- -

Approved Judgment

Mrs Justice Cockerill:

1. There are two issues to be decided on the documents: Permission to appeal and costs.

2. The Maduro Board has sought permission to appeal, both on the basis of "some other compelling reason" and the more conventional "real prospect of success" basis. This application has been opposed by the Guaidó Board.

3. The Guaidó Board has sought orders that the Maduro Board pay the Guaidó Board's costs of the Remitted Issue and the Preliminary Issues in CL-2019-000303 and CL-2020-000304, to be subject to detailed assessment, if not agreed; and that the Maduro Board make an interim payment on account of the Guaidó Board's costs in the total amount of £2.4 million.

4. The Maduro Board's response is that:

   i) I have no jurisdiction in respect of the costs of the Preliminary Issues;

   ii) The correct order in respect of the Remitted Issue is an issue based order;

   iii) On that basis it is not appropriate to order any payment on account.

PERMISSION TO APPEAL

5. I can deal with this relatively briefly. While I am grateful for the Guaidó Board's careful and focussed submissions, the question of permission is really one which lies between the Court and the applicant. I had considered the question of permission at the time of completing the judgment and had formed the view that this was (unusually) a case for the grant of permission on the "some other compelling reason" basis.

6. I take first, however, the question of real prospect of success. This is because (i) a negative conclusion on this should give me pause for thought on the "some other compelling reason" question and (ii) it has the potential to impact interim payment.

7. I conclude that this is not a case where I would grant permission on the basis of real prospect of success. I do not consider there is a real prospect of success. The way the arguments work structurally is that the Maduro Board had to win all of Issues 2-4; loss of any one issue was fatal to its case. I have found that it lost all of Issues 2, 3 and 4A. Accordingly winning one issue on appeal would not suffice.

8. The issues are all ones on which I reached clear conclusions, and the result was reached by a fairly clear margin. Specifically:

i) Issue 2: the Maduro Board's case involved a considerable expansion of the existing common law position. Even taking a more cautious approach on the authorities (in particular *Air Foyle*) than was urged by the Guaidó Board, the Maduro Board argument fell considerably short of justifying such a step. The approach of the other authorities compels the conclusion that even

in the Court of Appeal the prospect of achieving such a significant expansion is fanciful;

ii) Issue 3: This is the argument which comes closest to establishing real prospect of success because of the nuance in the Supreme Court's judgment. While the second part of the appeal on this point is an appeal on fact it is the type of factual appeal which the Court of Appeal will be more inclined to consider, as being as well placed as the first instance judge. Had this ground stood alone I might well have concluded that it was just the right side of the line.

iii) In the case of Issue 4A, the margin was particularly large and the permission submissions are not compelling. The main plank of the argument is an appeal on fact relating to available remedy which concerns the type of finding (evaluation of live evidence) which the Court of Appeal will rarely disturb; and a proper basis for such an appeal is not really attempted. Even were the Court of Appeal prepared to go some way on this point another outcome is unlikely given the very clear (uncontested) breach of the rules of natural justice.

I would therefore consider the "real prospect of success" hurdle not to be surmounted in two cases, and to be marginal in the remaining case. Accordingly the chances of any appeal affecting outcome are, in my assessment, highly fanciful.

9. In normal circumstances this would conclude the argument on permission. It is unusual for a first instance court to grant permission on the "some other compelling reason" basis; normally such considerations are best left with the Court of Appeal. But this case is the exception which proves the rule. I am entirely confident that if I did not grant permission, the Court of Appeal would do so on this basis.

10. This is a case which can rightly be called unique. It concerns a claim with a very significant value, even in the context of the Commercial Court. It concerns a significant proportion of the gold reserves of a large foreign state. The first round of issues raised by that dispute have already engaged the Supreme Court. The consideration of the case thus far has been expedited because the consequences of the decision have the potential to affect all the citizens of Venezuela. The issues which I have had to decide are, in their consideration of the operation of a foreign apex court, effectively unprecedented. The public-international backdrop is not static. While I have taken a very clear view on the issues which I have found dispositive, the issues are ones where the law is either novel or little ventilated and the case plainly falls within the category of raising points of importance in the development of the substantive law.

11. Thus, while I have given careful thought to the slightly anomalous situation of giving permission on an appeal which I consider to be well below the merits hurdle, particularly given the delay which any appeal would involve, I consider that permission to appeal should be given in this case.

COSTS

Costs of the Preliminary Issues

12. On this first issue, the Maduro Board's submissions have a superficial attraction. They point out the history of the costs orders, which is this:

    i) Teare J awarded the Guaidó Board the whole of its costs of the Preliminary Issues, including the trial before him;

    ii) The Court of Appeal overturned Teare J on both Recognition and Justiciability and ordered the Guaidó Board to pay the whole of the Maduro Board's costs in the Court of Appeal. The Court of Appeal ordered that the Guaidó Board and the Maduro Board should each bear their own costs of the hearing of the Preliminary Issues below and of the Consequentials Hearing on 24 July 2020 .

    iii) In their costs submissions to the Supreme Court dated 17 January 2022, the Guaidó Board requested that: *"The costs order made in favour of the Guaidó Board at first instance by Teare J at paragraph 2 of his Order dated 24 July 2020 should be restored."*

    iv) The Supreme Court did not order that the costs orders made by Mr Justice Teare be restored; and did not order (as the Guaidó Board had sought in its draft) that *"the Court of Appeal's order dated 6 October 2020…is set aside"*.

    v) The issue of the costs before Mr Justice Teare was not explicitly remitted to the Commercial Court by the Supreme Court. It does not form any part of the Remitted Issue as defined at paragraph 6 of the Order of Mr Justice Foxton dated 4 February 2022 (the "Foxton Order").

13. However this ignores some critical background. In the Supreme Court the Maduro Board responded to the Guaidó Board's submission by itself submitting that: *"[t]he eventual winner of the case still remains to be determined: the Guaidó Board's preliminary issues have not been determinative. The Supreme Court should make no order as to costs or, alternatively, make an order of costs in the case."*

14. The outcome appears to follow from that submission. There was no express provision in respect of costs – but that in a sense flows from the Maduro Board's own submission. It was its case that costs should not be dealt with by the Supreme Court because the result would depend on the outcome of this phase of the process.

15. That outcome – that costs of the Preliminary Issues as well as the Remitted – Issues are for this Court (subject to appeal on the Remitted Issues) is entirely logical:

    i) The consequence of the remittal pursuant to the Supreme Court's prior (and separate) Order was that the Commercial Court was again seised of "the proceedings";

ii) The reason for that was that the answer to the Remitted Issues was necessary to reach an outcome on the Preliminary Issues;

iii) The Supreme Court Judgment was a complete vindication for the Guaidó Board on Recognition and a partial victory on Justiciability, which victories one would expect to see reflected in costs at some point; and

iv) It would be illogical for a costs order imposed by the Court of Appeal, which (i) was predicated on its decision being determinative (ii) was predicated on a view of the law which has been both overtaken and criticised, to stand.

Costs of the Remitted Issue

16. On this issue the Maduro Board submits that this is the relatively unusual case where an issue based costs order is appropriate. That is because although the Guaidó Board successfully resisted recognition of the STJ Judgments, the Guaidó Board lost on Issue 4B, the independence and impartiality of the STJ and that this was an issue which occupied an inordinate amount of preparation time on the part of the Maduro Board in order to deal with the allegations raised – in part because of the sheer volume of hearsay material relied upon by the Guaidó Board, and because of the *"unfocused manner in which the material was deployed"*.

17. In respect of the requirement under CPR 44.2(7) that the court consider, before making an issue based order, whether it is practicable to make an order under CPR 44.2(6)(a) or (6)(c) instead, the Maduro Board submitted that neither alternative course (paying a proportion of the other party's costs, or costs from or until a certain date only) would work fairness in the circumstances of this case. This is because neither alternative properly compensates the Maduro Board for the very substantial costs properly incurred on an issue on which they succeeded.

18. Unsurprisingly the Guaidó Board contended that there should be no issue based costs order, and that costs should follow the event.

19. The Guaidó Board's central riposte to the Maduro Board case is that those costs were only incurred because of the Maduro Board's unreasonable refusal to accept the correctness of the Guaidó Board's position on Issues 2, 3, and 4A, each of which was independently fatal to the Maduro Board's attempts to have any of the STJ Judgments recognised. Further it contends that there are aspects of the Maduro Board's conduct which can properly be criticised. Such conduct would justify rejecting any reduction urged by the Maduro Board and awarding the Guaidó Board's costs in full, including a failure to face up to the problem of Issue 4A, reference to irrelevant material and late provision of information as to the case being run on the facts.

20. I am as always alive to the indications in the rules and in the authorities that the starting point should be for costs to follow the event and that first instance judges should be alert to resist the tendency to routinely move away from that position, which deprives the default rule of its primacy (see in particular *Fox v Foundation Piling* [2011] 6 Costs LR 961 at [62] per Jackson LJ).

21. Nonetheless this is a case where I consider that:

    i) the issue was lost, albeit, for reasons which I gave at [245] of the judgment, my reasoning was brief; and

    ii) there must be some reflection of the loss of Issue 4B in the costs order which I make.

22. This is in essence because, as I indicated in [245] of the judgment *"[a]lthough some way down the batting order, it was an issue which has dominated the parties' preparation for trial, with lengthy pleadings/submissions exchanged on both sides."*.

23. The reference to "lengthy" is actually a considerable understatement:

    i) Annexes 1 to 3 to the Guaidó Board's Reply dated 11 March 2022 (which plead the Guaidó Board's case on impartiality and independence) are, at 24 pages, over twice the length of the Guaidó Board's Re-Amended Statement of Case.

    ii) The Guaidó Board's Hearsay Notice setting out documents relating to Issue 4B was 14 pages long with 126 references to passages within 60 separate documents.

    iii) The reports and other materials relied upon by the Guaidó Board in support of Issue 4B came to some 2,240 pages, almost the entirety of the factual material relied upon by the Guaidó Board at trial.

24. Before passing on to consider the best way to reflect this loss, I pause to note the authorities upon which the Maduro Board relied. They have reminded me via *Summit Property Limited v Pitmans* [2001] EWCA Civ 2020, and *Johnsey Estates (1990) Limited v Secretary of State for the Environment* [2001] EWCA Civ 6535 that the power to make an issue based costs orders was seen as an important change under the CPR to be exercised even when there was no unreasonableness in pursuing a point in order to discourage the *"no stone unturned"* or as the White Book puts it "*kitchen sink*" approach to litigation.

25. The Maduro Board has also reminded me via *F & C Alternative Investments Ltd v Barthelemy (No 3)* (CA) [2012] EWCA Civ 843; [2013] 1 WLR 548 that there is no requirement of exceptionality for the imposition of an issue based costs order.

26. I note in particular the quote from the judgment of Arnold J in *Hospira UK Ltd v Novartis AG* [2013] EWHC 886 (Pat) at [2]:

> "The principles to be applied in these circumstances are familiar subject to one small qualification. The court generally approaches the matter by asking itself three questions: first, who has won; secondly, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that

> issue; and thirdly, are the circumstances (as it is sometimes put) suitably exceptional to justify the making of a costs order on that issue against the party that has won overall."

27. This is a case which on its face engages the appropriate criteria for the making of an issue based costs order. The Maduro Board has won this issue thought it lost most of the others. The issue is a relatively circumscribed (in the sense of discrete) one; it is not a case like so many which are seen in the Commercial Court, where the lost issue is so enmeshed with the won issues that making an issue based costs order would merely result in satellite litigation, and further unnecessary costs and effort.

28. This trial began life as a short preliminary issue. It was about the enforceability of the STJ Judgments. It was put thus in the Foxton Order:

> "Whether, and if so to what extent, the Maduro Board may rely on judgments of the Venezuelan Supreme Tribunal of Justice ("STJ") to which recognition or effect should be given by courts in this jurisdiction in accordance with domestic rules of private international law and the public policy of the forum."

29. It is plain from the Supreme Court's judgment that they saw the remittal as pertaining to "quashing decisions" and "one voice". The argument on independence and impartiality emerged in the Guaidó Board's reply of 11 March 2022.

30. That issue did, as I have noted, change the evidential complexion of the case. It also had a significant effect on its presentation. Orally Mr Fulton KC did not shy away from the submission that the case was *"about the Maduro regime"*. Further although my analysis placed it as a subsidiary issue the Guaidó Board itself placed the issue front and centre of its submissions. In opening the case in writing the Guaidó Board placed this point at the forefront thus:

> "6. During earlier phases of the litigation, the Maduro Board sought to marginalise the strong language used, including by HMG, to condemn the "illegitimate", "kleptocratic" and "brutal" Maduro regime. The Maduro Board also now say at [13] of its Appendix 1 that this is not what the case is now about. However, the political background in Venezuela is of considerable importance to the Remitted Issue…
>
> 7. Here, the widespread nature of the allegations of political interference of an "insidious" kind and the evidence of the Maduro regime's brutal repression of dissent and assault upon the rule of law are important aspects of the inquiry into the likelihood of the STJ having been able to deliver "robust and balanced justice". When it comes to assessing the STJ's impartiality and independence, the Court must therefore ask itself: have the Judges of the STJ shown "courage and steadfastness of a high order"? Or does their track record point instead to complicity in Mr Maduro's autocratic political agenda?..."

31. Yet it was not, analytically, a first or even second rank point, as the judgment demonstrates. So far as concerns the Guaidó Board's submission that the other issues should have been conceded, this is an argument which really flies in the face of the issue based costs order jurisdiction. Much of the justification advanced for the Guaidó Board's submission lies in the strength of the natural justice argument (ie that it was wrong of the Maduro Board not to conceded the point, or the factual bases for the point). The problem is if that argument was so unanswerable it would follow that Issue 4B was the more unnecessary to be advanced.

32. The Guaidó Board would say that Issue 4B had to be taken because of the Maduro Board's failure to engage with the factual basis for Issue 4A, and that until it was known that there was no answer to the notice points (or at least what answer was made), Issue 4A could not be said to be unanswerable. However while I have a degree of sympathy with the argument that the Maduro Board should have engaged earlier with effectively pleading to the facts, the assessment of the facts where the facts are known to both parties (as they were in relation to the process underlying the key judgments) need not depend on such steps.

33. Nor am I attracted by the Guaidó Board's submission that it *"remained concerned that the Maduro Board might belatedly produce some evidence of publication of the proceedings or of notification having been sent"*. This argument is not a strong one, particularly in circumstances where the concern is not said to be that a genuine notification might have been produced but rather that *the Maduro Board regime, already accused of improperly procuring the STJ Judgments in the first place, might cause such evidence to be fabricated to facilitate the recognition of those judgments*." If the notifications feared were false they would be unlikely to affect the outcome on Issue 4A, as their genuineness could and would have been challenged.

34. Further, while I accept the difficulties of taking the optimum decisions in the context of expedited trial timetables, I had concerns (which I reflected both in argument from the opening of the case and in the judgment) as to the extent of the material deployed (and hence of the costs incurred) in relation to issue 4B in circumstances where there was a lot of evidence, but not of the best quality and very limited time to deal with it. That is only reinforced by the Guaidó Board's submission in this context that if it had really been focussing on this point:

> "…it would have: (i) elevated that to its main argument; (ii) adduced additional expert evidence on Venezuelan law (e.g. as to the perversity of the STJ's repeated decisions to hold the entire NA in "contempt"); (iii) taken every possible step to secure the attendance of factual witnesses (e.g. former STJ judges Christian Zerpa and Carmen Porras); (iv) sought a longer trial accordingly."

35. This resonates not just with the authorities on issue based costs orders but also with the point made by Foxton J in *PJSC National Bank Trust v Mints and others* [2022] EWHC 1132 (Comm) and reiterated in the Commercial Court's Practice Note of 30 March 2022 as to points taken which consume a significant amount of the parties and Court's resources but which can never realistically produce a result:

> "The Judges of the Court would also urge parties - in the interests of proportionate litigation - to give careful consideration to the number of points which are run, whether peripheral points will realistically lead anywhere if the primary points fail …"

36. The main question therefore is whether this is a case for an issue based costs order or for a percentage reduction. Frequently the court will follow the line of least resistance via CPR 44.2(6)(a) or (6)(c). However, as has been noted elsewhere, a percentage reduction is not a perfect solution – it is inevitably something of a blunt instrument. Further one faces the unattractive prospect of, having concluded that the tax judge could not sensibly "break out" one issue, conducting a brutalist approximation via page and line counts of submissions and transcripts, which are inevitably inaccurate (because of the iceberg nature of preparation) and will themselves in significant pieces of litigation turn into major generators of costs. This is a point noted with characteristic wisdom by Mann J in *Sycamore Bidco Ltd v Breslin and Dawson* [2013] EWHC 583 (Ch); [2013] 4 Costs LO 572, at [28]:

> "Assessing the court time involved in the various issues is a quasi-scientific way of starting on the activity, but it is less than wholly satisfactory because it is not necessarily a guide as to the pre-trial costs which, in this case, would be very significant. As more than one judge has said, the exercise has to be a broad brush one. Quasi-scientific exercises such as that carried out by the parties in relation to the trial timetable are only a starting point…"

37. Here I am satisfied that there is a sufficient "reason based on justice" for making a form of issue based costs order. This issue was a marginal issue with a very high cost implication. It need not have been taken at all. Further the independence defence itself, even if it were to have been pursued could, as I have noted, have been advanced with less exhaustive evidence and very possibly with fewer heads of argument. In this case the point in issue is not so enmeshed that breaking it out will result in confusion. Rather when I come to consider whether a percentage reduction is appropriate I am faced with the problem that assessing the appropriate percentage would be no more than a guess – a concern which is reinforced by the very different percentages urged on me as the parties' respective fallback arguments (£657,000 i.e 100% of the Maduro Board's costs/no more than 10%). Indeed, this is one of the probably quite unusual cases where an issue based approach will be easier than settling on an appropriate percentage. It is thus more practicable to make an issue based order than a percentage, and therefore more just.

38. I accept that is it not an entirely distinct issue; there is a degree of crossover into some of the other points (particularly Issue 4A) but that crossover is very limited indeed, and such background as was necessary to pray in aid for those purposes could have been obtained without the extensive evidential base which was adopted for the purposes of the independence defence. In truth the main crossover relied on is one of background/prejudice which was not relevant to the central issues.

39. Therefore I conclude that this is a case for an issue based costs order. The crossover element which would inevitably have been incurred and the "conduct" issues can be reflected by making the order one whereby the Guaidó Board does not recover its costs of this issue, but does not result in payment by it of the Maduro Board's costs of the issue.

Interim Payment

40. In the light of the preceding determinations, the question of interim payment becomes relevant. On this the Guaidó Board sought an interim payment of £2.4 million, derived from two components:

    i) An interim payment in respect of the Guaidó Board's costs of the trial of the Remitted Issue which came to a total of c. US$1.9m / £1.6m. The Guaidó Board seeks an interim payment on account of 50% of those costs, namely £800,000.

    ii) An interim payment in respect of the Guaidó Board's costs of the Preliminary Issues which came to a total of c. US$3.8m / £3.2m. Again, the Guaidó Board seeks an interim payment on account of 50% of those costs, namely £1.6m.

41. The Maduro Board resists an interim payment inter alia on the basis that:

    i) The Maduro Board, as the paying party, will not likely be able to recover any sums in the event of overpayment;

    ii) There are strong prospects of success on appeal;

    iii) The question of who will be the ultimate winner or loser at the end of the proceedings as a whole is not known;

    iv) Any liability to pay costs has already been satisfied because (i) there is only one BCV or (ii) its lawyers' fees have been paid from BCV funds in New York.

42. If an interim payment is ordered the Maduro Board makes a variety of points on quantum.

43. On these issues I am not persuaded that this is a case where the usual position as to interim payment should be diverged from. Specifically:

    i) Overpayment is unlikely;

    ii) There are not strong prospects of success on appeal, for the reasons I have already given;

    iii) It is hard to see how, at this point, the Maduro Board could be the ultimate winner;

iv) The satisfaction argument is not convincing. Both parts effectively rerun arguments dismissed by the Supreme Court.

44. In the light of the conclusions above, it would seem that the question of interim payment on the Remitted Issue will have to be further considered. However I can now make an order for interim payment in respect of the Preliminary Issues. The level of the fee earners charging rates do justify a reduction beyond the usual range of percentages. However big and important this litigation, in the light of the new Guideline rates an uplift which effectively doubles most of the rates is unlikely to be regarded as justifiable. I therefore order an interim payment of 45% (ie £1.44 million) in relation to the costs of the Preliminary Issues.