Neutral Citation Number: [2022] EWHC 3094 (Comm)

Case No: CL-2019-000127 and others

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2022

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

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Between :

THE REPUBLIC OF MOZAMBIQUE	**Claimant**
- and -	
CREDIT SUISSE INTERNATIONAL AND OTHERS	**Defendants**

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- -

Jonathan Adkin QC, , Ryan Ferro, and Richard Blakeley (instructed by Peters & Peters Solicitors LLP) for the Republic of Mozambique

Andrew Hunter QC, Sharif Shivji QC, Andrew Scott and Tom Gentleman (instructed by Slaughter and May) for Credit Suisse

Paul Bowen QC, Rupert Butler and Natasha Jackson (instructed by Leverets Group) for the CS Deal Team

Duncan Matthews QC (instructed by Signature Litigation LLP) for the Privinvest Defendants and Mr Iskandar Safa

Duncan Bagshaw and (instructed by Howard Kennedy LLP) for Ms Maria Isaltina Lucas

Laura Newton (instructed by Enyo Law LLP) for BCP, UBA and BIM

Timothy Lau (instructed by Boies Schiller Flexner) for Beauregarde Holdings LLP and Orobica Holdings LLP

Hearing dates: 23 June 2022

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Judgment 5

Mr Justice Robin Knowles J:

Introduction

1. The Third to Fifth Defendants (the "CS Deal Team") are concerned that they face criminal proceedings in Mozambique and Lebanon and their extradition is being sought to Mozambique. The Republic suggests that these criminal proceedings in Mozambique cannot or are not progressing to a trial. Indeed, Ms Davies for the CS Deal Team gives evidence that:

   "… the parallel criminal proceedings have become procedurally stuck, there is not going to be any *despachio de pronuncia*".

2. The proceedings in Lebanon appear to be much more recent.

3. The criminal proceedings in Mozambique are said to be based on the same or similar factual grounds to offences for which the CS Deal Team have pleaded guilty in the United States of America. Again, the position is not precise; elsewhere the criminal conduct to which they have pleaded guilty in New York is said to be "likely to have some overlap with the Mozambican criminal proceedings".

4. The factual basis of the criminal proceedings in Mozambique is said to be materially identical to that of these (civil) proceedings in the Commercial Court in London. The prosecutor in Mozambique is the Attorney General of the Republic of Mozambique, and it is by the Attorney General that the Republic acts as Claimant in these proceedings.

5. Against this background, two application notices have been issued before this Court by the CS Deal Team. The first is dated 14 April 2022. A second application notice dated 20 June 2022 was issued three days before the hearing.

6. As framed and advanced in the written argument of its Leading Counsel, Mr Paul Bowen QC, the CS Deal Team sought:

   (1) "suitable directions to provide an effective 'use immunity' to protect their privilege against self-incrimination ("PSI") by preventing the use of any material disclosed by them in these proceedings in any criminal investigation or trial in Mozambique"; and

   (2) "a stay of [these] proceedings, alternatively a stay of any obligation of disclosure, because of the real risk they face of a breach of their right to a fair trial (not limited to the PSI) in the criminal proceedings they face in Mozambique".

7. As appears below, what the CS Deal Team sought by the applications was further adjusted in oral argument. In both written and oral argument, the point in time at which the CS Deal Team invited a decision or relief was the subject of some change or flexibility. I have done the best I can to deal now with the points that need to be dealt with now, recognising that other points may be dealt with at other stages. I have sought not to be drawn into points that are unsuitable for now and some of which may be more suitable for the trial.

8. The applications of the CS Deal Team extend to all documents to be produced by them on disclosure, any more developed statement of case (defence), any further information, any witness statements in these proceedings (and in some respects) any oral evidence at trial.

The privilege against self-incrimination

9. The nature and importance of what it is convenient in the present case to call "the PSI", as the CS Deal Team do, was not materially in issue. I had the advantage of a valuable written and oral review of authorities in the area from Mr Bowen QC, leading Mr Rupert Butler and Ms Natasha Jackson. For present purposes I do not need to enter into the finer detail of that review.

10. I record however that the review included reference to a number of points, which I will accept for present purposes even though in other contexts some would (and may at a later point even in these proceedings) require closer debate and detail, and not all are accepted by the Republic.

11. These points are that:

    (1) It is possible for the PSI to extend to pre-existing documents and not simply documents or statements to be made.

    (2) The PSI is still relevant when the risk is of incrimination in foreign criminal proceedings and not in criminal proceedings in England & Wales.

    (3) The PSI can extend to criminal investigation as well as to criminal proceedings.

    (4) The Court itself will be concerned with the PSI so as not to act in breach of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

    (5) The PSI guards against the effect of what is being done and not just its purpose.

Protections in Mozambique

12. The CS Deal Team note that the Republic is not a party to the ECHR, and raise concerns over the adequacy of protection of the PSI in Mozambique.

13. The argument that there is no protection under Mozambique law for the PSI where there is just a criminal investigation rather than proceedings, was emphasised by Mr Bowen QC. So too the possibility that on expert evidence before this Court there is:

> "some consensus … that, although not expressly recognised, the PSI has a degree of protection under Mozambican law …[but] there is no consensus that the protection goes as far as it does at common law or under Article 6 ECHR".

Examples of where it is suggested that there are shortfalls in protection are given in the expert evidence adduced by the CS Deal Team.

14. The CS Deal Team also expressed through their legal team and by reference to written expert evidence, concerns over what it termed judicial independence and corruption in Mozambique.

The concerns expressed directly by the members of the CS Deal Team

15. On the day of the hearing of the applications, each member of the CS Deal Team provided an affidavit in which they stated that they were concerned that if they were:

> "compelled, on pain of punishment, either to plead a defence, provide a witness statement, or produce documents for inspection"

then they:

> "may be compelled to disclose information that is incriminating which will then be used by the Republic of Mozambique in the criminal proceedings that they have commenced against [them] in Mozambique …".

16. Each stated that they would:

> "in due course, produce a further affidavit to explain in more detail why any such defence, witness statement or document may be incriminating".

No such further affidavit was before the Court at the hearing. Each member of the CS Deal Team however added:

> "However, I understand that the stage has not yet been reached in these proceedings where I am under any compulsion to produce any such defence, witness statement or document."

A declaration

17. In a further application notice dated 20 June 2022, shortly before the hearing, the CS Deal Team sought a declaration in these terms:

> "A declaration that, in the absence of adequate safeguards for the PSI, the CS Deal Team are entitled to rely upon the PSI and cannot be compelled to disclose for inspection any documents under CPR 31.3 or otherwise, to provide any witness statements under CPR 32.4 or otherwise or to give further details of their defence under CPR 16.5 or otherwise if it is established there is a real risk that such documents will be used in a criminal investigation or criminal prosecution in Mozambique or Lebanon which arise out of the same or substantially the same matters that form the basis of these civil claims ("the PSI Declaration")."

18. In oral argument, this was what was sought first by Mr Bowen QC on behalf of the CS Deal Team. I respectfully decline to make such a declaration. This is for three principal reasons:

    (1) The proposed declaration seems, with respect, an attempt to summarise or abbreviate a legal position when it is more desirable and appropriate that the full legal position be available when specific circumstances arise.

    (2) The proposed declaration does not provide an answer to the parties or the public, because of the material qualifications: "in the absence of adequate safeguards" and "if it is established there is a real risk".

    (3) The proposed declaration would, if made, potentially extend the PSI to every document within the disclosure obligations of the CS Deal Team, every part of the witness statements of themselves and of witnesses proposed to be called by them and all further parts of their defence, whether or not those had anything to do with incrimination of the CS Deal Team.

19. I add that the draft declaration does not seem to distinguish between the different nature of the CPR provisions involved, or follow through the different consequences. In outline:

    (1) Disclosure of documents by a party is required and can be compelled, but has not yet been.

    (2) A party is not compelled to provide a witness statement or witness statements for a witness or witnesses at trial, but the party may not be permitted to call evidence at trial from the relevant witness without having provided it.

    (3) A party is not compelled to defend, but if he does defend then he must provide a suitable statement of case.

A "use immunity" by reference to CPR restrictions

20. The CS Deal Team identify that CPR 5.4C, 31.22, 32.12 and 34.12 contain restrictions preventing use of documents for a collateral purpose.

21. The CS Deal Team express these concerns about the restrictions:

    (1) The restrictions may at a future date be lifted on application to the Court.

    (2) Unless the Court orders otherwise under CPR 3.1(3) or 18.2, the restrictions do not apply to their statement of case (their defence) or to any further information they provide under CPR 18.1.

    (3) Unless the Court orders otherwise, the restrictions under CPR 5.4C, 31.22 and 32.12 will lift for a document referred to at or read by a Court for a hearing in public, or a witness statement put in evidence (and see CPR 32.13(1)).

(4) Unless the Court makes an order for a "confidentiality ring", the restrictions "will not prevent the disclosure of material to the members of the legal team for the purpose of the litigation".

22. The CS Deal Team contend in addition that the only means by which the Mozambican authorities may obtain documents for the criminal proceedings there is by means of an application under the Crime (International Cooperation) Act 2003. There is no such application as things stand.

23. In these circumstances Mr Bowen QC argues that the Court "must create a collateral use immunity as a necessary (although not sufficient) step to protect the [CS Deal Team's] PSI".

24. The directions sought to create this "collateral use immunity" are as follows:

(1) "Pursuant to CPR 31.22(2) or under the Court's inherent jurisdiction, the prohibitions contained in CPR 31.22 and 32.12 on the collateral use of documents and statements disclosed by the CS Deal Team for purposes other than for use in the Proceedings (including their use for the purposes of any criminal investigation and/ or prosecution of the CS Deal Team in any jurisdiction) ("collateral use") are modified such that any collateral use is prohibited until the conclusion of any criminal proceedings against the CS Deal Team in Mozambique or any other jurisdiction".

(2) "Pursuant to CPR 3.1(3) or under the Court's inherent jurisdiction, the collateral use of the CS Deal Team's responses to requests for further information is prohibited until the conclusion of any criminal proceedings against the CS Deal Team in Mozambique or any other jurisdiction".

(3) "Pursuant to CPR 18(2) or under the Court's inherent jurisdiction, the collateral use of the CS Deal Team's statements of case is prohibited until the conclusion of any criminal proceedings against the CS Deal Team in Mozambique or any other jurisdiction"

(4) "Pursuant to CPR 5.4C(2) or under the Court's inherent jurisdiction, the CS Deal Team's statements of case may not be disclosed to any non-party until the conclusion of the criminal proceedings in Mozambique or any other jurisdiction"

(5) "Pursuant to CPR 39.2, the hearing of any part of the Proceedings involving the CS Deal Team will be heard in private."

(6) "Pursuant to the Court's inherent jurisdiction, any statement of case, document or witness statement disclosed by the CS Deal Team which is referred to in a public hearing will not be disclosable to any third parties."

(7) "Any material disclosed by the CS Deal Team be subject to a confidentiality ring, under the terms set out in the Schedule to this Order."

25. The Republic is prepared to agree to some of these directions, but not others. It regards the confidentiality club as impractical in the complex circumstances of these proceedings and it regards the hearing in private of the trial against the CS Deal Team

as inappropriate. I agree with its position on both. However, I note the Republic's position otherwise and am prepared to make orders that will bind the Republic (only) where the Republic has indicated that it is prepared to be bound. Particularly having regard to the complexity of these proceedings, these orders will be subject to a liberty to apply.

26. But the Court must also have regard to wider interests. I respectfully decline to make these directions, at least at this point, in a way that will affect others. This is for these reasons:

(1) The directions sought are not confined to documents that could involve the PSI and to circumstances that could involve any real risk to the PSI. The CS Deal Team have not shown that unless all future development of the defence, and every document in their disclosure, and all witness statements they might wish to serve, are granted "use immunity" now then the PSI is at risk.

(2) In the present case, even where it might otherwise be said that a particular document or documents would involve the PSI, the presence of pleas of guilty in the USA by the CS Deal Team to offences mean that it is especially desirable that decisions on the PSI, which involve the exercise of a discretion, are reached by reference to the particular document or documents rather than generally.

(3) In similar vein, and at least in the present case, the better point at which to make any decision on whether to permit collateral use of a document or documents is when and if an application for permission to make collateral use is made and the particular document or documents and requested use are identified.

(4) Again at least in the present case, the better point at which to make a decision that would prevent a document or documents entering the public domain is at the point when it or they are otherwise about to do so unless the Court decides that it or they should not. This will allow consideration of the consequences in the circumstances then prevailing (and having regard to the particular document or documents) for the principle of open justice, and may involve hearing the press or other wider representations.

(5) On the CS Deal Team's own case, as a method of protecting the PSI, the directions if made will not be sufficiently effective. Mr Bowen QC for example argues that there are practical reasons why it will be impossible to ensure that any documents once disclosed do not come into the possession of the police and prosecution in Mozambique.

27. I do not overlook that it is part of the CS Deal Team's argument, by reference to the available expert evidence, that Mozambican Law may protect or recognise PSI less than English Law does or can. This part of its argument will be available to the CS Deal Team, if it wishes to advance it, when and if the relevant restriction is about to end under the CPR (or the order by which the Republic agrees to be bound).

A stay of these proceedings; allegations by the CS Deal Team

28. The CS Deal Team goes on to say that the "use immunity" sought and considered above would not be sufficient "to protect the CSDT's right to a fair trial, which will include their right to PSI". Mr Bowen QC argues that:

> "until the [Mozambique] criminal proceedings have come to an end the civil claim [ie these proceedings in London] should be stayed … alternatively, the [CS Deal Team] should not be ordered to make disclosure."

29. The relevant application notice requests an order:

> "Pursuant to the court's general powers of case management, [the proceedings against the CS Deal Team are stayed, with liberty to apply.] [there shall be a stay of any requirement that the CS Deal Team:
>
> a. File and serve any further statements of case;
>
> b. Produce for inspection (and, where the PSI is engaged in relation to disclosure, disclose) documents or material;
>
> c. Provide responses to further Requests for Information made pursuant to CPR 18.1;
>
> d. File and serve witness statements of fact; and
>
> e. Give oral evidence at trial.]"

30. The CS Deal Team canvassed that matters were most appropriately resolved at a stage after disclosure and after what has been described as a <u>Carnduff v Rock</u> [2001] 1 WLR 1786 application (by the CS Deal Team to declare "that the Proceedings cannot be tried fairly and to stay the Proceedings against the CS Deal Team, unless and until the Republic gives full and sufficient disclosure in the action") has been made.

31. I understand that a concern on the part of the CS Deal Team is that the Republic by its Attorney General will not comply with orders made by the Court concerning the use of documents, and that the Mozambique Court will countenance this disregard. In fairness to the Republic, its Attorney General and the Mozambique Court, it is relevant to note that this concern is immediately hard to reconcile with the fact that "use immunity" directions were sought by the CS Deal Team and where the Republic has offered them the CS Deal Team has accepted them.

32. The CS Deal Team has filed expert evidence of wide-ranging content although it accepts that the Court cannot resolve all matters at this present hearing. Of what it described as a "real risk of systemic judicial corruption and the lack of judicial independence in Mozambique", the CS Deal Team recognised that these matters were contested and at the stage of its written argument it made clear it did not advance them for decision now.

33. The CS Deal Team records that "the experts have differing opinions on the wider availability of a fair trial for the CS Deal Team in Mozambique" (see paragraph 6.2 of the continuation sheets of its second application notice, dated 20 June 2022). Indeed, the CS Deal Team state that "… the availability, or otherwise, of a fair trial for the CS Deal Team in Mozambique is central to the PSI Application". However, the CS Deal

Team did not help me understand why a stay of the present proceedings before the Commercial Court on grounds of PSI is a suitable means of addressing concerns about the availability of a fair trial in criminal proceedings in Mozambique (rather than a fair trial here).

34. More specifically to the present case the CS Deal Team does allege, in particular:

(1) "The CS Deal Team members were not notified of, or given an opportunity to resist, the Republic's extradition application [which] was heard at a time when the Republic was engaged in [the current proceedings]".

(2) "… the claimant in these Proceedings is one and the same as the prosecutor in relation to the parallel criminal proceedings".

(3) "There have been significant issues with the trial of the 19 defendants in the criminal trial in Maputo which relates to the same events that concern these proceedings".

(4) "[A] Red Notice against [another individual] has been discharged because (amongst other reasons) INTERPOL has decided that the underlying prosecution is motivated by 'political considerations'". (Red Notices against the CS Deal Team appear not to have been discharged).

(5) "The … analysis [of the Supreme Court of the Republic] in the extradition judgment as to why there was no risk of a breach of the double jeopardy principle does not withstand scrutiny."

35. On the material question of a fair trial here, these points, even if taken at face value, do not put a fair trial at risk. In particular the second is obvious and will be true in many cases where there are complex proceedings across different jurisdictions. The first and third to fifth are not shown to relate to what the CS Deal Team will disclose by a more developed defence, by its disclosure, or by witness statements or in oral evidence.

36. I add further that, as expressed, none of the points cause me to conclude that the Republic by its Attorney General will not comply with orders by this Court concerning the use of documents (including those agreed by the Republic or that may be considered at a later point by this Court), or that the Mozambique Court will countenance that disregard.

37. On the other hand, these proceedings before the Commercial Court involve issues that are of considerable importance to the parties, including in economic and reputational terms. All parties have devoted considerable resources and time towards their trial at the end of 2023. A stay would be an enormous thing.

38. I gratefully adopt the following summary from the judgment of Gloster J in Bankas Snoras v Antonov [2013] EWHC 131 (Comm) at [18]:

> "There was very little difference between Mr. Lewis QC and Mr. Zacaroli QC as to the relevant principles applicable to the grant of a stay of civil proceedings. For present purposes they may be summarised as follows:
>
> i) The court has a discretion to stay civil proceedings until related criminal proceedings have been determined, but it "is a power which has to be exercised

with great care and only where there is a real risk of serious prejudice which may lead to injustice"; see *R v Panel on Takeovers and Mergers, ex p Fayed* [1992] BCC 524, per Neill LJ at p.531E-F; cited with approval in *A-G of Zambia v Meer Care & Desai & Ors* [2006] EWCA Civ 390.

ii) The discretion has to be exercised by reference to the competing considerations between the parties; the court has to balance justice as between the two parties; a claimant has a right to have its civil claim decided; the burden lies on a defendant to show why that right should be delayed; see *Panton v Financial Institutions Services Limited* [2003] UKPC 8 (PC) at [11].

iii) A defendant must point to a real, and not merely notional, risk of injustice. …"

39. Where, as here, the CS Deal Team propose that the stay embrace even amplification of their statement of case or defence, and related further information, the following further passage from the decision of Gloster J illuminates:

"iv) The fact that a defendant has a right to remain silent in criminal proceedings, and would, by serving a defence in civil proceedings, be giving advance notice of his defence, carries little weight in the context of an application for a stay of civil proceedings. There is no right to invoke the privilege against self-incrimination in relation to putting in a defence, as compared with the right in civil proceedings to invoke the privilege where a defendant is being interrogated, being compelled to produce documents or cross-examined; see per Waller LJ in *V C* [2002] CP Rep 8, at paragraphs 37 and 38. …

v) Moreover, today, even in criminal proceedings, at least in England and Wales, a defendant is expected to adumbrate a positive defence at an early stage. Thus the disclosure of a defence in civil proceedings is unlikely to disadvantage a defendant in criminal proceedings; see *ibid* at paragraph 38."

40. At this stage in these proceedings, drawing this part of the applications together, on the argument addressed to me so far, on the material I was asked to read, and saying nothing on the Carnduff v Rock application (which would look to the Republic's disclosure not the CS Deal Team's), I am currently wholly unpersuaded that a stay of these civil proceedings is appropriate in this case. In particular:

(1) The CS Deal Team has not pinpointed any real risk of serious prejudice which may lead to injustice if the present proceedings continue.

(2) The CS Deal Team will have the benefit at least for a period (during which it can explore the position further, both in Mozambique and in light of its pleas) of some restrictions (under the CPR and as agreed by the Republic).

(3) The evidence of the CS Deal Team at least on this application does not support a proposition that the Republic, and in particular the Attorney General, would breach the orders that this Court will make and may hereafter make concerning the use by the Republic and Attorney General of documents.

(4) There appears to be sufficient consensus between the experts in Mozambican law that all or many of the documents in question would not in any event be admissible against the CS Deal Team in criminal proceedings in Mozambique.

(5) On Lebanon, no doubt because it is a recent development, there is almost no material at all.

An application to cross examine

41. By an application notice dated 20 June 2022, three days before the hearing, the CS Deal Team sought an order for the Republic's expert witnesses, Dr Castiano, to attend to give oral evidence, and an order that the Attorney General of Mozambique, alternatively Deputy Attorney General Matusse, attend to give oral evidence and to be cross-examined pursuant to CPR r 34.7.

42. As things stand I decline to make these orders. It was far too late for the hearing (as was recognised by its terms, which were for the cross examination to happen at a later point). In the context of this case, as things currently appear, the course proposed would add little and is disproportionate.

43. It is particularly important in the present, very challenging, proceedings to guard against satellite litigation if it can appropriately be avoided. But here as elsewhere I do not rule out cross examination or detailed argument at an appropriate time on one or more very focussed points of expert evidence.

44. For the time being I record that for the purposes of this judgment I have not needed to draw on challenged parts of the expert opinion of Dr Castiano. I record this as I appreciate the CS Deal Team contend he lacks independence as an expert in these proceedings. I express no view on that contention as it is not necessary to do so for present purposes.

The Republic's purpose

45. There is one further but related point I should address. The CS Deal Team also urge that the Republic is not entitled to use these proceedings as a process or method to extract material for the criminal proceedings in Mozambique (or elsewhere). In evidence for the CS Deal Team, Ms Davies says:

> "The CS Deal Team fears that the Republic is only using these Proceedings against them to shore up its current position and to conduct a proxy criminal investigation ."

46. During the relatively intensive course of case managing these proceedings to trial, I record that I have not seen any evidence that persuades me that these proceedings are being used in that way or that that is their purpose.

Conclusion

47. It is important to keep in mind that the CS Deal Team are not, at least yet, being compelled to serve an amplified defence or a witness statement or to give oral evidence.

48. They are required to give disclosure, but they have not shown where their forthcoming disclosure presents a risk that a PSI is designed to offer some protection against, and why that protection was not in practice let go long ago with their guilty pleas in New York.

49. In this case the right balance at this stage and on the evidence and argument made is more than sufficiently struck by the directions to be made with the agreement of the Republic and no more (and binding only the Republic).

50. Where it is necessary or appropriate to return to the subject area of these applications I will be ready to do so.