Neutral Citation Number: [2023] EWHC 430 (Comm)

Case No: CL-2020-000760

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2023

Before :

SIR NIGEL TEARE
sitting as a Judge of the High Court

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Between :

PRIMAFACIO LIMITED	**Claimant**
- and -	
(1) TRES CANOPIA LIMITED	
(2) EUROENERGY INVESTMENTS CORPORATION	**Defendants**

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John Bignall (instructed by **Sea Green Law Limited**) for the **Claimant**
Edward Levey KC and Gillian Hughes (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 22 February 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 02 March 2023 at 10:30am.

Sir Nigel Teare :

1. This is the first CMC in this action. However, in addition to the usual case management issues, there are two specific applications made by the Claimant. The first is an application to strike out part of the Reply to the Defence to the Counterclaim and the second is an application for security for the Claimant's costs of responding to the Counterclaim. I reserved judgment on those two applications but determined the case management issues at the hearing.

2. The Claimant, "**PF**", is a Cypriot company, and is part of the Jasper Group of companies, which is involved in the renewable energy sector in Greece.

3. The First Defendant, "**TC**", and the Second Defendant, "**EIC"**, are, respectively, Cypriot and BVI companies in the EuroEnergy Group (the "***EuroEnergy Group***"), which carries out activities in the renewable energy sector and is part of the Libra Group of companies (the "***Libra Group***"). TC was acquired by EuroEnergy Investments Limited ("***EIL***"), a company incorporated in Cyprus and a subsidiary of EIC.

4. The claim is for €2,165,000 due but unpaid under a Share Purchase Agreement between PF and TC dated 6 February 2017 (having been under negotiation since September 2016; '**the SPA**'), and pursuant to a Corporate Guarantee ('**the Guarantee**') by which the Second Defendant ('**EIC**') guaranteed the relevant obligations of TC.

5. Pursuant to the SPA PF agreed to sell, assign and transfer to TC and TC agreed to buy the entire issued share capital of Natracian Limited ('**Natracian**'). Natracian is a Cypriot company which owned four companies ("**the project companies**"), each of which in turn owned photovoltaic parks for electricity generation located in Greece with a total capacity of 11.6 MW.

6. The Libra Group is described by the Defendants as a diverse international business active in 35 countries in various fields. It is owned by members of the Logothetis family. The renewable energy part of its activities are carried out through the EuroEnergy Group, which, as already noted, includes the Defendants. TC is not itself an active trading company, but a company through which the EuroEnergy Group holds shareholdings in companies which operate photovoltaic farms. The Natracian SPA transaction was effectively one between the EuroEnergy Group and the Jasper group, with PF and TC effectively vehicles used for that purpose.

7. The purchase price under the SPA was agreed at €26 million, plus certain contingent sums. There were then adjustments, most importantly by reference to the indebtedness of the project companies to Piraeus Bank and the National Bank of Greece, which was to be deducted. The result of the adjustments was that the net sum of €12.7 million was payable by way of Provisional Consideration, and this was duly paid in March and April 2017.

8. The SPA provided for the subsequent payment of further sums, namely the Lagie Consideration and what was defined as 'the Amygdalia Claim'. It is these further sums to which the claim relates.

9. It is common ground that the Natracian shares were indeed transferred, and that, according to the terms of the SPA, the sums claimed in this action (save possibly for

one small sum) in fact fell due but have not been paid. There has been no claim to rescind the SPA. The defence advanced is that TC is entitled to set off its Counterclaim against the claim (and that there is therefore no sum payable under the Guarantee).

10. At the time of the SPA, a Mr Felix Bitzios was (or was styled as) the CEO of the Libra Group for Greece and the Southeast Mediterranean region. TC's Counterclaim is based on an allegation that PF (through Mr Matthew Jamurtas ("**MJ**")) dishonestly assisted Mr Bitzios in acting in breach of fiduciary duties owed to TC by causing it to enter into the SPA at a price for the shares in Natracian that was more than their true or market value. The sum claimed by TC, said to represent an 'Excess Sum', is 'at least €7 million'.

11. There are related proceedings in Cyprus which were relied upon in an unsuccessful application by the Defendants to obtain an order staying the proceedings before this court. I have been told that the Cypriot action is brought by companies said to form part of the Libra Group against 79 corporate and individual defendants, including PF and MJ. The Cypriot proceedings involve allegations of fraud, corruption and bribery with claims totalling approximately €500 million for damages, restitution for unjust enrichment and/or equitable compensation.

12. The Cypriot proceedings involve a number of allegedly interrelated sets of transactions collectively referred to as "the EDF2" transactions. One of the transactions said to form part of "EDF2" is the sale of Natracian.

13. PF has also brought proceedings in Greece arising from a transaction which took place in June 2020, whereby shares in one of the project companies (referred to as Archani) were sold by EIL to a company called Flexam Tangible Asset Income Fund for a consideration of €5 million which has not been paid to TC or indeed EIL but appears to have been paid to EIC.

The application to strike out.

14. The Reply to the Defence to the Counterclaim seeks to rely upon similar fact evidence, in particular by alleging that certain other transactions in which MJ and Mr Bitzios had been involved had taken place at an inflated price. Those transactions related to the purchase of shares in companies called Danron Holdings Ltd and Verinare Ltd ("**D&V**") in early 2016. Counsel for the Defendants said in their Skeleton Argument that the Defendants seek to rely on those transactions as similar fact evidence in support of their case that Mr Bitzios and MJ were not acting honestly in relation to the Natracian Transaction and, in particular, in support of their case that the contract price in relation to the Natracian Transaction was not set by reference to the actual value of the Natracian shares.

15. When the court has to decide whether to admit similar fact evidence it must do so in accordance with the guidance given by Lord Bingham in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 at paragraphs 3-6 and summarised by Brooke LJ in *JP Morgan Chase v Springwell Navigation Corporation* [2005] EWCA Civ 1602 at paragraphs 67-69. There is a two stage approach. First, is the proposed similar fact evidence potentially probative ? If it is, it is admissible. Second, are there good grounds why the court should decline to admit it in the exercise of its case management powers?

I need not further summarise the guidance of the Supreme Court and Court of Appeal but I have it well in mind.

16. There is no dispute that the similar fact evidence is logically probative of the Counterclaim; see the Skeleton Argument of counsel for PF at paragraph 26. It is therefore legally admissible. That is stage 1.

17. The dispute in the present case concerns stage 2. This raises the difficult issue of balancing probative value against case management issues. Lord Bingham described this question in *O'Brien* as often requiring a "very difficult and sometimes finely balanced judgment."

18. Counsel for PF submitted that "such limited probative value as [the allegations] might have would be vastly outweighed by the increase in time and costs involved in litigating the issues raised" (see paragraph 26 of the Skeleton Argument). The reasons that the probative value was "limited" were (i) that it was highly unlikely that these allegations would make a decisive difference to the outcome of the Counterclaim and (ii) that the transactions were not inter-related and are substantially different from each other (see paragraph 27 of the Skeleton Argument). Litigation of the allegations would increase the costs of the litigation by some £700,000 (at least) and the trial would take 5 days longer than it would otherwise take (see paragraphs 29 and 33(f) of the Skeleton Argument).

19. Counsel for TC submitted that the allegations, on the assumption they are proved, would be highly probative because they would demonstrate a propensity on the part of Mr. Bitzios and MJ to act dishonestly and show a pattern of agreeing to buy/sell renewable energy assets at a price which they knew to be significantly more than their market value (see paragraphs 24 and 25 of their Skeleton Argument). With regard to stage 2 counsel accepted that the similar fact evidence will have some case management impact in terms of additional time and cost but submitted that such impact would not come close to justifying the exclusion of otherwise relevant probative evidence (see paragraph 28 of the Skeleton Argument). TC's own costs would increase by some £260,000. PF's estimate of the amount by which its own costs would increase should be viewed with caution because their budget had been revised twice in a matter of days (see paragraph 34). TC said that the trial would be lengthened by no more than 2 days (see paragraph 31).

20. At this early stage in the proceedings (this is the first CMC, before disclosure and exchange of witness statements) I do not consider that I can reliably form the view that it is "highly unlikely" that the similar fact evidence will make a decisive influence to the outcome of the Counterclaim. There is of course considerable force in the argument that, having regard to what I am told is the extensive amount of contemporaneous documentation concerning the Natracian transaction (see paragraph 28(ii) of the Claimant's Skeleton Argument), the trial judge may well be able to determine the Counterclaim on the basis of that evidence. But it is possible that the Court may be left in doubt, having examined the evidence concerning the Natracian transaction, as to how to determine the Counterclaim. In such an eventuality it is possible that the similar fact evidence may enable the trial judge to decide that the Counterclaim has been established. At this stage I cannot say that that is likely or unlikely. It is possible. That possibility is of importance because it may enable the Court to reach a correct and just decision. I have noted the reasons why it is suggested that the respective features of the

Natracian transaction and the D&V transactions may limit the likelihood and scope of any inference from one transaction to the other (see paragraph 28(b)-(e) of the Skeleton Argument) but at this stage the possibility appears to me to be real.

21. Against that possibility must be weighed the time and cost of resolving the issues raised by the similar fact evidence relied upon by the First Defendant. Counsel for PF submitted that the additional time and cost would be disproportionate to the probative value of the similar fact evidence.

22. The duration of the trial will be lengthened. The parties are agreed that without the similar fact evidence the trial is likely to last 7-8 days. If the similar fact evidence is admitted MJ's cross examination is likely to take longer than it would otherwise do. The Defendants will call one additional witness. (I am told that Mr. Bitzios will not be giving evidence.) At present the Defendants' view is that there was no due diligence and no negotiation as to the D&V transactions and hence the additional documentation is not expected to be great. The Claimant has said that relevant documents are yet to be searched for but, as noted by counsel for the Defendant, it has not been said that MJ has instructed the Claimant that there is a substantial number of documents. The expert evidence on valuation is also likely to take longer because 3 companies will have to be valued not one. Finally, closing submissions are likely to be longer. The submission that Mr. Bitzios and MJ acted dishonestly in relation to the D&V transactions is a serious and substantial allegation. It is unlikely that the inclusion of such matters would add only 2 days to the trial. Doing the best I can I think that 3 days is a better estimate; though if, contrary to the Defendants' expectation, there turns out to be considerable contemporaneous documentation then 4 days may be required.

23. The cost of the trial will also be increased. More classes of documents will have to be searched for. MJ's witness statement will have to be deal with the D&V transactions and the expert valuers will have to cover the valuation of those companies. Counsels' preparation for the case will be longer and more time will be spent at trial by both counsel and solicitors. The combined costs of the parties, both incurred and estimated, total some £2.5 million, assuming the similar fact evidence is not admitted. If the similar fact evidence is admitted, the combined costs of the parties, both incurred and estimated, have been estimated to total some £3.2 million.

24. So, instead of 7-8 day trial costing some £2.5 million, there may be a 10-12 day trial costing some £3.2 million. The increase in time and cost is significant but must be viewed in context. An already substantial and expensive trial will have become a somewhat longer and more expensive trial. I am not persuaded that the extra time and cost will be disproportionate to the probative value of the similar fact evidence, though the total estimated costs (whether the similar fact evidence is excluded or not) are in excess of the amount claimed and therefore disproportionate, notwithstanding that the proof of commercial fraud based upon inference is usually expensive.

25. I have to have regard to promoting the ends of justice. Admission of the similar fact evidence may enable the court to reach the right and just answer. But justice also requires the right answer to be achieved by a trial process which is fair to both parties. I have asked myself whether the increase in time and cost to the Claimant of admitting the similar fact evidence would render the trial process unfair to the Claimant. I do not think it would; the Claimant will in any event face a substantial and expensive trial.

26. I have also borne in mind the risk that admission of the similar fact evidence will distract the court and the parties from the primary evidence concerning the Natracian transaction which is of course the most probative evidence concerning the issues raised by the Counterclaim. Such distraction risks an unfair trial. However, in circumstances where the trial of the Claim (as to which there are few if any issues) and of the Counterclaim (as to which there are substantial issues) is estimated to take 7-8 days and the trial of the issues raised by the similar fact evidence will, as it appears to me at this early stage, add at 3-4 days to the trial I do not consider that the risk of distraction is such as to justify exclusion of the similar fact evidence.

27. Counsel for the Claimant (in his Skeleton Argument but not in his oral submissions) relied upon the circumstance that the D&V transactions are also the subject of the Cypriot proceedings so that, if the similar fact evidence is admitted, there will be a risk of inconsistent judgments. There is such a risk, though I was told that there was a jurisdictional challenge to at least part of the Cypriot proceedings. In circumstances where the point was not developed I do not consider that I can properly or fairly give weight to it.

28. I have therefore reached the conclusion that the ends of justice require and permit the similar fact evidence to be admitted. However, as Lord Bingham emphasised in *O'Brien* (at paragraph 8) the final say on this matter rests with the trial judge. It was accepted by the Defendants that the Claimant could renew its application to exclude the similar fact evidence either at or before trial. By that stage it will be known what further documentation there is and what the issues truly are in relation to the similar fact evidence.

Security for costs

29. PF seeks an order that the TC provide security for its costs of the Counterclaim. The basis of that application is that TC is a company and there is reason to believe that it will be unable to pay PF's costs if ordered to do so; see CPR 25.13(c). If there is such reason then security may be ordered if it is just to make such an order having regard to all the circumstances of the case; see CPR 25.13(1)(a).

30. The relevant principles were not in dispute. It is not sufficient that there is doubt whether TC can pay a costs order. There must be reason to believe TC will be unable to pay even if such inability cannot be established on the balance of probabilities. What is relevant is an inability to pay within the time ordered, usually 14 or 28 days; see *Jirehouse Capital v Beller* [2009] 1 WLR 751 at paragraphs 26-34 and *Holyoake v Candy* [2016] EWHC 3065 (Ch) at paragraph 63. EWCA Civ 908.

31. If such reason exists it will generally be just that security be ordered. But the respondent to the application for security (in this case TC) may establish that there are countervailing reasons which justify a refusal to make an order for security. One such reason is where another party is willing to undertake to pay any costs ordered to be paid by the respondent and that other party is "a good mark for those costs"; cf *Holyoake v Candy* [2016] 6 Costs LR 1157 at paragraphs 57 and 67. In the present case EIC is willing to give such an undertaking and is said to be a good mark for the costs.

32. Counsel for PF advanced a formidable list of factors in support of the submission that there is reason to believe that TC will be unable to pay the costs of the Counterclaim if ordered to do so. They can be summarised as follows:

    i) TC is not an operating company which generates income or holds assets other than shareholdings.

    ii) TC's only bank account has a zero or minimal balance.

    iii) In its latest Financial Accounts the Auditor casts doubt on TC's ability to continue as a going concern. TC's largest asset is a loan which is not paying interest and in respect of which the Auditor cannot assure itself of the borrower's ability to pay.

    iv) The substantial loans to TC from Piraeus Bank have been sold at a substantial discount in 2021 which suggests that the Bank had little confidence in the loans being repaid.

    v) Although TC has indirect shareholdings in other companies those shares are subject to a pledge in favour of the purchase of the loan from Piraeus Bank. Those other companies may generate income but such cash is subject to a pledge and can only be paid to TC if Cepal, the loan administrator, consents. There is no cogent evidence that Cepal would give such consent.

33. Counsel for TC submitted in writing (but did not develop the submission orally) that the above evidence does not establish the required reason to believe that TC will not be able to pay the costs of the Counterclaim if ordered to do so. Reference was made to the witness statement of Mr. Harvey, TC's solicitor, to the effect that Cepal would give consent to cash sums generated by the operating companies and other companies within the EuroEnergy Group being used to pay the costs ordered to be paid by TC. That "evidence" is in paragraphs 40-42 of Mr. Harvey's first witness statement. But that "evidence" can carry no weight. Mr. Harvey merely states what he has been instructed without identifying who gave the instructions. It is said that Cepal has previously given consent to the "payment of costs" on TC's behalf. But what costs and in what circumstances is not stated. Significantly, as it appears to me, there is no evidence from Cepal as to whether it would give consent to pay the costs of the Counterclaim.

34. I am persuaded that there is reason to believe that TC will be unable to pay the costs of the Counterclaim if ordered to do so. Indeed I think it is likely it will not pay. TC has no liquid assets from which it could pay such costs. Its only source of funds is dependent upon Cepal, the loan administrator. Cepal is concerned with ensuring payment of the loan and not with payment of costs to third parties. Had Cepal been willing to give its consent one would expect there to be evidence from it to that effect and there is none.

35. Counsel for TC submitted in writing, and developed the submission orally, that EIC was willing to undertake to pay any costs ordered be paid by TC and that EIC was a "good mark" for those costs. Counsel submitted:

    i) EIC and its subsidiaries had cash and cash equivalents of over $10 million and net assets of over $67 million.

ii) Some of its shares in subsidiary companies were not the subject of a pledge (as in indicated in a coloured organogram referred to at the hearing).

iii) EIC's own cash balance was €2.8 million and Cepal would permit further sums to be available to meet orders for costs.

iv) EIC paid the costs of TC's (and EIC's) unsuccessful jurisdictional challenge.

36. The last point is of limited assistance. The costs of the jurisdictional challenge were approximately £47,000, substantially less than the sum of costs likely to be awarded against TC in the event that the Counterclaim is dismissed.

37. Points (i) and (iii) are not supported by any cogent evidence. Stavroula Balari, General Counsel of the EuroEnergy Group, has exhibited to her very recent witness statement dated 18 February 2023 a "balance sheet for EIC prepared by the EuroEnergy finance". That supports the figures in (i) above. However, the exhibit is unsigned and is unaudited and contains no explanatory notes. EIC is a BVI company and so is not obliged to file audited accounts. In those circumstances one would have expected, at the least, a signed statement by the head of "finance" explaining how and why the document was put together and how reliable it is. In the absence of such evidence it is difficult for the court to place any significant reliance upon the document. Stavroula Balari has also stated that she has been informed by Mr. Psathakis, the Chief Financial Officer of EuroEnergy, that as of 17 February 2023 EIC's own cash balance is €2,828,670. That supports the figure in (ii) above. However, the sum is said to held "in a bank account of a Libra Group entity to EIC's order". The entity which holds the cash balance, which might not even be within the EuroEnergy Group, is not identified and the terms on which the cash is held to the order of EIC are not identified or further evidenced. Given the absence of any audited accounts one would have expected, at the least, a signed statement by Mr. Psathakis verifying the sum of cash, identifying the company which held the cash and exhibiting that documents evidencing the terms on which the cash was held to the order of EIC. In any event there is no evidence that the sum will be available when costs have to be paid. With regard to the reliance on Cepal giving consent for the release of further sums that is not convincing for the reasons already given.

38. Some of the shares in subsidiaries indirectly owned by EIC are not, it appears, subject to a pledge; point (ii) above. But, as was pointed out by counsel for PF in his reply submissions, there is no evidence about those companies or that the shares in or assets of those companies could be realised so as to enable an order for costs to be paid within 14-28 days.

39. It may well be the case that the EuroEnergy group is a substantial concern. But it has chosen to locate EIC in the BVI where no audited accounts need to be filed. In those circumstances clear, unambiguous and transparent evidence from an identified and reliable source is required in order to show that it is a "good mark" for costs ordered against TC. There is no such evidence.

40. I bear in mind that the EuroEnergy Group must be paying considerable costs in Cyprus and must be paying the no doubt substantial costs being incurred by TC in this case. However, having regard to the nature of the dispute between the parties it is impossible to infer from the fact that the EuroEnergy Group is paying such costs that it would be

willing to pay the substantial costs ordered to be paid by TC to PF in the event that the Counterclaim were dismissed.

41. In these circumstances TC has wholly failed to show that EIC is a "good mark" for costs ordered to be paid by TC in respect of the Counterclaim. No other point was relied upon by counsel for TC in his written or oral submission as to why it would not be fair and just to order security for costs. It must follow that, in circumstances where PF has established that there is reason to believe that TC will not be able to pay costs in the event that the Counterclaim is dismissed, it is fair and just in all the circumstances of the case that TC provide security for those costs.

42. The parties informed me that, once they know my decision on the application to strike out, they will be able to agree the figures in which the parties' costs should be budgeted. I will therefore not rule (yet) on the figure for which security should be given. I trust that it can be agreed. I do however think that the order should provide for security in stages. Subject to any other agreement of the parties I think the first tranche should be provided within 28 days of my order (to include costs until the completion of disclosure), the second tranche by 30 June 2023 (to include costs until the completion of witness statements), the third tranche by 31 October 2023 (to include costs until the completion of expert evidence), and the fourth tranche by 01 January 2024 (to include the costs of trial). Security should be by payment into court or by provision of a first class London bank guarantee. It appears that the other terms can be agreed (see paragraph 61 of the Claimant's Skeleton Argument).

Conclusion

43. The application to strike out is dismissed. The application for security is granted.

44. The costs of the true case management issues resolved at the hearing should be costs in the case. With regard to the two applications, PF has won on one and TC has won on the other. My provisional view, subject to any submissions the parties may feel compelled to make, is that there should be no order as to the costs of those applications. To order that PF should have its costs of the security for costs application and that TC should have its costs of the strike out application would only generate further costs because the respective costs would have to be assessed. It seems to be fair and cost effective to make no order as to the costs of those applications.

45. I invite the parties to agree an order giving effect to my rulings.