Neutral Citation Number: f2020l EWHC 2490 (Ch)

BL-2020-001343

Case No: BL-2020-001343

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF **ENGLAND AND WALES**
BUSINESS LIST (ChD)

Royal Courts of justice
Strand, London, WC2A 2LL

Date: 14th September 2020

Before:

MR JUSTICE MEADE

Between:

(1) LONDON CAPITAL & **FINANCE PLC (IN ADMINISTRATION)** **(2) FINBARR O'CONNELL, ADAM STEPHENS, HENRY SHINNERS, COLIN HARDMAN AND GEOFFREY ROWLEY (JOINT ADMINISTRATORS** OF **LONDON CAPITAL** & **FINANCE PLC (IN ADMINISTRATION))** **(3) LONDON** OIL & **GAS LIMITED (IN ADMINISTRATION)** **(4) FINBARR O'CONNELL, ADAM STEPHENS, COLIN HARDMAN AND LANE BEDNASH (JOINT ADMINISTRATORS** OF **LONDON** OIL & **GAS LIMITED (IN ADMINISTRATION))**	Claimant
- and -	
(1) MICHAEL ANDREW THOMSON **(2) SIMON HUME-KENDALL** **(3) ELTEN BARKER** **(4) SPENCER GOLDING** **(5) HELEN HUME-KENDALL**	Defendant

Stephen Robins, Matthew Abraham and Andrew Shaw (instructed by Mishcon de Reya LLP) for the Claimants
Amit Gupta for the First Respondent
Caley Wright for the Second and Fifth Respondents
Tim Owen *QC* for the Third Respondent

Charles Béar QC, Laura John and Karl Anderson for the **Fourth Respondent**
Penelope Small and Catherine Collins for the **Serious Fraud Office**

Hearing dates: 7th September 2020

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Judgment Approved by the court

Covid-19 Protocol: This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 17.09.2020 at 12:00pm.

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MR JUSTICE MEADE

MR JUSTICE MEADE :

1. This judgment should be read with my ex tempore judgment of 7 September.

2. I said at the conclusion of the hearing on 7 September that I would deal with one outstanding point on paper, and I have now received submissions on it from Counsel for the Claimants (including submissions in reply) and for the Fourth Respondent.

3. The point is as follows.

4. The Fourth Respondent (and the Third Respondent said it took the same position) resisted the continuation of the WFOs on the basis (essentially) that the existence of the CROs in themselves meant that there was no risk of dissipation. I will call this the "narrow CRO point".

5. The other Respondents all agreed with the Claimants that any argument about the continuance or setting aside of the WFOs, whether on the basis raised by the Fourth Respondent, or on the more factually intensive questions about arguable case or evidence to support the inference that the Respondents were of such character that they would dissipate assets if not restrained (I will call this "factual risk of dissipation"), could be raised by those Respondents at the further hearing I ordered, without any change of circumstances.

6. But no such agreement was made with the Fourth (or Third) Respondents and I am asked to decide if their unsuccessful resistance to the continuance of the WFOs on the narrow CRO point has the consequence that they not be permitted to raise at the further hearing the issues of arguable case or factual risk of dissipation, unless they could show a change of circumstances (they accept they cannot raise the narrow CRO point again without a change of circumstances). The Claimants say that they ought not to be permitted while the Third and Fourth Respondents say that they ought.

7. The factual position is this:

   i) It was for the Claimants to justify the continuance of the WFOs.

   ii) None of the Respondents was in a position to contest the WFOs on the basis of arguable case or factual risk of dissipation, because they had not had time and had no adequate funding. The Claimants did not say otherwise and it was plainly the case.

   iii) It was therefore fair and pragmatic that the Respondents other than the Third and Fourth Respondents agreed with the Claimants as described above.

iv) The narrow CRO point, which the Third and Fourth Respondents wanted to run, was self-contained and if successful would have led to the WFOs not being continued. It was capable of being run on the return date and although I rejected it, it was arguable. I must say that on the basis of the existing first instance authority I thought the Third and Fourth Respondents' arguments were very weak, but that is not to say that there was anything wrong with making them.

8. The Third and Fourth Respondents did not contest arguable case or factual risk of dissipation. They did not say they would not argue them in future and the Claimants did not ask them to agree not to do so.

9. Had the narrow CRO point been a good one but the Third and Fourth Respondents been deterred from running it by fear of later being disabled from contesting arguable case or factual risk of dissipation, a significant injustice would have been worked, in that they would have been wrongly subject to the WFOs for the period of some months until the further hearing.

10. The Claimants cite authority in support of their position. This is what they say at paragraphs 5 to 7 of their skeleton on this point:

> "'5. The general principle is set out in Gee on Commercial Injunctions, 6th ed., [21-057]:
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> "Where there is an interim order made after a hearing on the merits inter partes, the court will not entertain an application to set aside that order or part of it or which is inconsistent with that order, unless there has been a material change of circumstances, or the judge on the original application had been misled in a material respect, or if there has been a manifest mistake. This prevents re-litigation of the same application, and applies when it was open to the applicant to take the same points on the original hearing even though he did not do so. The principle has the consequence that if a point was open to the applicant on an earlier interlocutory application and was not pursued, then it is not open to the applicant to take the point in a later application when there has been no material change of circumstances and no new facts".
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> 6. The leading case is Chanel Ltd v F.W. Woolworth & Co Ltd [1981] 1 WLR 485 in which Buckley LJ explained at 492: "When the motion for an injunction came before the judge inter partes, the

defendants did not seek any adjournment to permit them to put in evidence in answer to the plaintiffs' evidence". Instead the defendants sought to challenge the injunction, but without success. Buckley LJ held that they could not subsequently seek to have a 'second bite of the cherry' (at 492-493):

"The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter".

7. As this quote makes clear, the principle applies not only where the defendant could have filed the evidence before the interlocutory hearing but also where the defendant could have sought an adjournment to obtain further time to adduce evidence.'

8. This principle has been applied on numerous occasions. In Orb a.r.l. v Ruhan [2016] EWHC 850 (Comm), for example, Popplewell J had to deal with a number of applications arising out of a freezing order made by Cooke J which had been obtained by the defendant (Mr Ruhan) against the claimants (the Orb Parties) (at [1]-[2]). The order required Mr Ruhan to fortify his cross undertaking in damages by charging certain shares (at [48]). Mr Ruhan had done so but the Orb Parties sought further fortification on the ground that the shares were inadequate security. Popplewell J dismissed the application for a number of reasons, the first of which was that it was open to the Orb Parties to take the point before Cooke J but they had failed to do so. None of the material relied on had come to their attention subsequently; Cooke J had given them an opportunity to raise any objections to the shares as fortification, but they had not raised the points now sought to be raised, although they were well known to them; there had been no significant

> or material change of circumstances [81]. Popplewell J continued [82]:
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> "That is fatal to this ground for discharge: see Chanel Ltd v FW Woolworth & Co Ltd [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions" (emphasis added)."

11. As the Fourth Respondent points out, these cases are partly about situations where a party tries to reargue a point that they have lost at an earlier stage in proceedings (as in Chanel). That is not the case here.

12. However, Gee and Popplewell J in the passages cited above refer to situations where a party declines or fails to take a point which is open to it. I agree that a party may be precluded from taking that point later, but it is clearly not an absolute rule.

13. Further, in my view the underlying principles of the cases cited by the Claimants are (a) the prevention of an abuse in the context of interlocutory proceedings (rather than following concluded proceedings as is addressed by the Henderson v. Henderson form of abuse of process) and (b) the efficacy of the judicial process, as Popplewell J explained in the passage cited above.

14. I should mention that the Fourth Respondent relied on Holyoake [2018] Ch 297 at [40] and Butt v Butt [1987] 1 WLR 1351 at 1355. In my view those cases are consistent with my view of the underlying principles, but I accept the Claimants' submissions that they relate to different circumstances than the present.

15. It is often observed in the context of Henderson v. Henderson abuse that the question is not merely whether the party alleged to be prevented from taking a point previously available could have taken it, but also whether he or she should have.

16. Although the points about arguable case and factual risk of dissipation were open to the Third and Fourth Respondents in a theoretical sense, they were not open to them in any practical way, for the reasons explained above. They never elected not to run those points, but rather simply could not. They did not encourage the Claimants to think that the points were abandoned.

17. On the basis of the facts set out above, the Third and Fourth Respondents' behaviour was and is not abusive, and nor, as matters now stand before me, would it be abusive for them to take points on arguable case or factual risk of dissipation at the further hearing. On the contrary, although the narrow CRO point failed, it was just and not inefficient for them to be permitted to take it at the hearing on 7 September, and in a self-contained way, even if they were permitted to take other points in due course.

18. I am fortified in this view by the fact that the other Respondents are all free to challenge all points including arguable case and factual risk of dissipation at the further hearing, but I would have made the same conclusion without this consideration.

19. In retrospect, given the agreed position between the Claimants and the First, Second and Fifth Respondents, it might have been preferable for the Third and Fourth Respondents to state prior to arguing the narrow CRO point that they reserved their rights on all other points. It might also be said that the Claimants ought to have said that they would oppose that course. But if either of those things had happened, the result would merely have been that I would have made the decision represented by these reasons in advance of the narrow CRO point being argued, instead of afterwards. I am confident the result would have been the same.

20. I conclude that the Third and Fourth Respondents may argue good arguable case and factual risk of dissipation at the further hearing, without having to show a change of circumstances.

21. In the light of this judgment and in order to bring the timing for all the Respondents into line, I direct that the Third and Fourth Respondents do comply with the directions in paragraph 4 of the CMC Order dated 7 September in respect of any future discharge application.