Neutral Citation Number: [2006] EWHC 3361 (QB)

Case No: HQ06X02654

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2006

Before :

THE HONOURABLE MR JUSTICE GRAY

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Between :

(1) Alexander Turkot	**Claimants**
(2) Global G.O.L.D. Holding GMBH	
- and -	
(1) Oxus Gold plc	**Defendants**
(2) Bill Trew	

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Miss A. Marzec (instructed by **Carter Ruck**) for the **Claimants**
Mr A. Caldecott QC and **Ms Catrin Evans** (instructed by **Clifford Chance**) for the **Defendants**

Hearing date: 15th December 2006

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Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Gray :

1. Having at an earlier stage struck out the claim of the first claimant, Mr Turkot, on the ground that the words complained of are not capable of bearing the defamatory meaning attributed to them, I come now to the second application before me which is an application by the defendants for the trial of three preliminary issues, namely:
    (i) whether Global G.O.L.D. Holding GMBH ("C2") has a sufficient legal capacity to sue;
    (ii) whether C2 has a sufficient reputation to sue;
    (iii) whether the words are capable of referring to C2.
2. In paragraph 3 of the Particulars of Claim C2 describes itself as "a holding company registered under the laws of Austria". Mr Turkot is said to be the ultimate beneficial owner of 50% of the share capital of C2. The pleading does not vouchsafe who owns the other half of C2's shares.
3. Where exactly C2 fits into the corporate structure of which it appears to form part is unclear on the evidence before the court. The witness statement of the claimants' solicitor, Mr Andrew Stephenson says of C2 no more than that it is now well known as the joint holder of the licence to develop the goldmine and that C2 has plans to acquire interests in other precious and base metals projects in the former Soviet Union and adjacent countries.
4. There is a longer witness statement from Mr Audley Sheppard on behalf of the claimants. He has for some time been involved in the litigation arising from the circumstances under which Oxus Gold plc lost its licence to develop the mine. According to his evidence, in November 2005 Oxus was approached by an entity called Strategic Investments Group ("SIG") and their lawyers, Salans. At a meeting in December 2005 it was explained to Mr Sheppard and his clients that SIG was the holding company of a fund which was wholly owned by a US citizen named Mr Barbanel. Salans further indicated that the investors behind SIG were residents of the former Soviet Union and included Russian or Georgian "oligarchs". Later, in January 2006, Salans offered on behalf of "the Investment Group and SIG" to purchase the equity interest of Oxus in the gold mine. In the event it was, as I have said, C2 which was granted a mining licence in respect of the mine.
5. Researches carried out on behalf of the defendants have revealed that C2 is a wholly-owned subsidiary of Vitiano Holdings Limited, a company incorporated in Cyprus with a share capital of CYP 1000. Vitiano is in turn owned by two companies registered in the British Virgin Islands, namely Lagoon Global Investment Limited and Iman Financial Services Limited. Those two companies have a combined share capital of US $50,000. It is uncertain whether any and, if so what, link exists between Barbarnel and the Russian or the Georgian oligarchs to which Mr Sheppard referred. It may or may not be significant that the draft version of the mining licence ultimately granted to C2 was to be signed by Mr Barbanel with the power of attorney from SIG. The paid up capital of C2 is only €17,500.
6. I mention these aspects of the corporate structure of C2 because they are relevant to the first question which I have to determine on this application, namely whether the issues proposed by the defendants are suitable for preliminary trial. In my judgment the answer to that question is in the affirmative. The three proposed issues are themselves linked. All of them appear to me to raise questions which

are interesting and of some importance in the field of defamation: see the recent discussion in the House of Lords as to the circumstances under which a trading corporation can sue in the absence of proof of special damage reported in *Jameel v Wall Street Journal Europe* [2006] 3 WLR 642. Furthermore to the extent that Jerooy Altyn, the joint venture company which has the licence to develop the mine, is state-owned, consideration may have to be given to the ambit of the principle established in *Derbyshire CC v Times Newspapers Limited* [1993] AC 534 and *British Coal Corp v NUM*, unrep, June 28 1996.

7. Not only are the issues suitable for preliminary determination, I am also satisfied that the issues would be dispositive of the whole case in the event that they are determined in favour of the defendants. There is another argument in favour of directing preliminary issues: whilst the defendants have not as yet placed any substantive defence on the record, if they were, for example, to plead justification and if the preliminary issues or any one of them were to be decided in favour of the defendants, there would be a substantial saving in costs for both sides.
8. As Mr Caldecott QC on behalf of the defendants rightly points out, issues of capacity to sue and analogous questions as to non-justiciability are generally suitable for preliminary disposal: see *EEPTU v Times Newspapers Limited* [1980] QB 585 and *Derbyshire CC v Times Newspapers Limited* (already cited). I am persuaded that, other things being equal, the trio of preliminary issues proposed are also well suited for trial as such.
9. However Miss Marzec in her well-presented argument maintains that it is inappropriate for me to direct the trial of preliminary issues at least for the time being. She contends, firstly, that this application is premature, coming, as it does, before the defendants have given any indication what substantive defence, if any, they will be relying on. Secondly, Miss Marzec argues that, if there is to be a trial of any of the three preliminary issues, that trial would have to take place with a jury because issues of fact are likely to arise and in defamation actions questions of fact are left to juries to decide.
10. I will take these contentions in reverse order starting with the argument that any trial of these issues would have to be heard by a jury rather than, as the defendants propose, by a judge alone.
11. This argument of Miss Marzec is based on section 69 of the Supreme Court Act 1981, which, as far as material, provides:

> "*Where, on the application of any party to an action to be tried in the QBD the court is satisfied that there is in issue*
>
> *(b) a claim in respect of libel ….*
>
> *the action shall be tried with a jury, unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts ...which cannot conveniently be made with a jury.*
>
> *(4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim or issue as is mentioned in that subsection".*

12. Miss Marzec accepts that the effect of section 69(4) above is that the court may order some issues to be tried by a judge sitting alone and others by a jury, see

Phillips v Commissioner of Police for the Metropolis [2003] EWCA Civ 382, CA at para 17. But she contends that issues can only be hived off for trial by judge alone if the exclusionary criteria at the end of section 69(1) are satisfied. (I can see that there may be scope for an argument that the wording of section 69(4) permits the court to direct the trial of issues by a judge alone even where the exclusionary criteria are not satisfied in relation to those issues. This contention was advanced in *Kirby-Harris v Baxter* [1995] EMLR 516 at 523 but the Court of Appeal expressly declined to rule upon it. In the present case Mr Caldecott did not advance this argument. Accordingly I say nothing more about it).

13. I turn therefore to ask myself whether the exclusionary criteria are satisfied in relation to the proposed preliminary issues. It is common ground that the first two issues involve questions of mixed fact and law. (The third proposed preliminary issue is a matter for judge alone). The question for me is therefore whether such factual questions as arise in connection with the first two preliminary issues are such as to require prolonged examination of documents or accounts such as cannot conveniently be made with a jury. The principles applicable to that question are agreed by the parties to be found in *Aitken v Preston* [1997] EMLR 415 at 421.
14. Mr Caldecott's contention is that the kind of factual question which will arise in order to determine the legal capacity of C2 to sue and the sufficiency of its reputation to do so will inevitably require prolonged examination of documents and accounts such as cannot be conveniently carried out with a jury. Miss Marzec on the other hand maintains that, once the material documents have been disclosed, it may turn out that no *issue* of fact arises at all because the answers to questions of primary fact will be apparent from the documents and accordingly not controversial. Alternatively Miss Marzec asserts that such questions as may arise will be capable of being answered without any need for a prolonged examination such as would not be capable of being carried out with a jury. In this connection Miss Marzec relies on an *extempore* decision of Sir Oliver Popplewell in *Al Rajhi Banking & Investment Corporation v The Wall Street Journal Europe and others* [2002] EWHC 1659 QB.
15. I am not convinced by Miss Marzec's argument. I think it can be said with some confidence even at this early stage that there are bound to be contentious factual issues arising in connection with the first two proposed preliminary issues. Those questions would be likely in my judgment to include for example the nature of C2's interests in the mines: the circumstances of C2's acquisition of that interest; the shareholding in and direction of C2 and the place which C2 occupies in whatever may turn out to be the corporate structure of the group of which it now forms part. It is furthermore overwhelmingly likely that the documents which will have to be considered in order to determine these questions will be lengthy and complex, consisting for the most part in legal documents. I acknowledge that in *Al Rajhi* Sir Oliver Popplewell directed that the issue of the claimant's entitlement to sue be determined by a jury. But that case concerned a trading company rather than a holding company and the issue was whether or not it had a trading presence or reputation in the place of publication. Mr Caldecott further points out that, when the issue came to be tried in *Jameel v Wall Street Journal* (unrep 1-19 December 2003, the jury in that case was in the event asked no questions at all on the topic.
16. As was explained in *Aitken,* even if the exclusionary criteria are satisfied in a particular case, the court retains a residual discretion to direct trial by jury. The existence of this power does not appear to me to assist C2. The discretionary

considerations all seem to me to favour the resolution of the preliminary issues by a judge sitting alone. It is worth noting that in *Multigroup Bulgaria Holding v Oxford Analytica Limited* [2001] EMLR 28, Eady J felt himself able to determine the submission of the defendants in that case that the corporate holding company had insufficient legal status to sue without referring any issue of fact to the jury.

17. For the above reasons I am unable to accept Miss Marzec's submission that the proposed preliminary issues or any of them would have to be determined by a jury. I think the exclusionary provisions in section 69(1) of the 1981 Act apply.
18. That brings me to Miss Marzec's other contention, namely that the defendants' application for an order that there be a trial of the preliminary issues is premature. She puts her argument in the following way: she says that the charge against C2 is a serious one, involving as it does an allegation of suspected complicity in an attempted assassination. The press release has been circulated not only within the jurisdiction of this court but also via the internet in many other jurisdictions (see paragraph 7 of the Particulars of Claim). Miss Marzec points out that over the 5 months or so since the alleged libel was published the defendants have conspicuously avoided giving any indication what substantive defence, if any, they intend to rely on. She submits that it is a basic requirement of civil procedure that a defendant should indicate what defence is going to be relied on. Moreover Miss Marzec points out that, if no substantive defence is in the event to be relied on, then the presently proposed preliminary issues would in reality be the only (or almost the only) issues which would have to be determined at the trial in relation to the issue of liability. In that event she argues that there would be no point in having any issues tried as preliminary issues.
19. Miss Marzec further submits that the consequence of a direction for the trial of preliminary issues would inevitably be that the defendants would be able to continue to sit on the fence, not saying what substantive defence, if any, they propose to rely on until after the final disposal of the trial of the issues. This state of affairs could, and probably would, continue to exist for a considerable period of time. One can envisage problems about disclosure and the possibility that the losing party would appeal against the determination of the preliminary issues. In the meantime C2 would be denied the opportunity to vindicate its reputation.
20. The principal basis on which Mr Caldecott for the defendants resists the contention on behalf of C2 that the present application is premature is that a refusal to order preliminary issues would be both oppressive and disproportionate. Mr Caldecott argues that, if the court declines to order preliminary issues here and now, the defendants will have no alternative but to carry out the no doubt hugely expensive research necessary in order to decide whether to plead justification or perhaps some other substantive defence. That expense will be entirely wasted, says Mr Caldecott, if the preliminary issues or any of them are ultimately decided in favour of the defendants.
21. Whilst the court is bound to listen sympathetically to a litigant (even an apparently wealthy litigant such as Oxus) who urges on the court a procedural course which would or might avoid the expenditure of substantial costs, I am on balance persuaded that the just course for me to adopt is to decline to order preliminary issues. I say that principally because I think that C2 would suffer an injustice if it were effectively to be prevented from taking steps to vindicate its reputation throughout the substantial period of time which it may take to resolve the preliminary issues. I should not of course be taken to be saying that the application for the trial of preliminary issues is refused for all time. It may well

be that there will come a time when it is apparent that preliminary issues are suitable in the circumstances of the present case. If for instance the defendants do mount a substantial plea of justification, then it may well be appropriate to direct the trial of the preliminary issues because their determination might dispense with the need to take the issue of justification to trial. For all I know, however, it may turn out that the defendants, having researched the matter, will decide not to rely on any substantive defence. In that event it may well be that the trial of preliminary issues will be suitable or alternatively the appropriate course may be to direct that the issue of liability in the action be tried first. For the present I refuse the defendants' application.