



In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2021: No. 257

BETWEEN:

KPMG TAX LIMITED

Plaintiff

-and-

FRANK MAJORS

MAXINE MAJORS

MODIFIED MDMW 2000 FAMILY TRUST

MAJORS FAMILY LLC

Defendants

Before: **The Honourable Chief Justice**

Appearances: **Mr. David Scorey KC, Mr. Mark Chudleigh and Mr. Erik Penz of Kennedys Chudleigh for the Plaintiff**
Mr. John Jarvis KC and Mr. Nicholas Howard of Walkers (Bermuda) for the Defendants

Date of Hearing: **8 November 2023**

Date of Judgment: **22 November 2023**

JUDGMENT
(Consequential Matters)

HARGUN CJ

Introduction

1. By Judgment dated 20 October 2023 (the “**Judgment**”) the Court (i) dismissed the application of Majors Family LLC (“**LLC**”), the Fourth Defendant seeking the discharge of the Interim Order dated 3 September 2021; and (ii) granted a permanent injunction against the LLC and the other Defendants (Frank Majors, the First Defendant; Maxine Majors, the Second Defendant; and the Modified MDMW 2000 Family Trust (“Family Trust”), the Third Defendant) in terms of the Interim Order.
2. The Court further stated that it is “*minded to discharge the injunction against Mr Majors, Mrs Majors and the Family Trust on the basis of their undertaking to the Court and to the Plaintiff but will give an opportunity to the Plaintiff to explain the basis of their objection before doing so.*”
3. At the hearing on 8 November 2023, the Court heard arguments in relation to the issues of (i) the terms of any stay pending the determination of any appeal LLC may pursue in the Court of Appeal; (ii) the appropriate wording of the undertakings offered by the First to Third Defendants and whether they should be incorporated in the order; and (iii) the issue of costs.

Stay pending appeal

4. Paragraph 3 of the draft order provides that “*The Fourth Defendant shall, whether by itself or through its members, trustees, officers, directors, employees, servants, agents, representatives, attorneys or otherwise, take all steps necessary to dismiss,*

withdraw and/or otherwise discontinue the Tennessee Proceedings against the Plaintiff.”

5. Mr Jarvis KC, for the Fourth Defendant, seeks an order that *“Paragraph 3 above is stayed until 2 December 2023, or (if before that date the Fourth Defendant files an appeal against this Order) until further order of the Court of Appeal.”*
6. The Court agrees that it is appropriate to stay Paragraph 3 of the draft order as suggested by Mr Jarvis KC given that (i) the Tennessee proceedings are effectively on hold pending the determination of any possible appeal in Bermuda; (ii) if the Tennessee proceedings had to be recommenced following a successful appeal to the Court of Appeal the Fourth Defendant may be faced with limitation issues under Tennessee law; and (iii) fresh proceedings in Tennessee following a successful appeal to the Court of Appeal will necessarily result in additional expense for the parties.

Terms of the order

7. KPMG contends that the Order should record that the First, Second and Third Defendants have provided the permanent undertakings set out in Schedule to the Order. The undertakings sought by KPMG are in terms of the permanent injunction granted by the Court against LLC and indeed the other Defendants. The terms of the undertaking sought by KPMG are:

“Each of the First, Second and Third Defendants hereby permanently undertakes:

1. *that they shall not, whether by themselves or through their trustees, officers, directors, employees, servants, agents, representatives, attorneys or otherwise:*
 - 1.1 *prosecute, pursue and/or otherwise continue and/or take any further substantive or procedural step against the Plaintiff in the in the proceedings commenced by the Defendants in the Chancery Court for the State of Tennessee, in the United States of America, Case No. 21-0641-III (the “Tennessee Proceedings”) because the Tennessee Proceedings breach the terms of the valid and binding arbitration agreement (“Arbitration Agreement”) governing the Defendants’ claims contained*

in Paragraph 14 of the Plaintiff's Standard Terms and Conditions for Advisory and Tax Services (the "Terms and Conditions"), save for the purpose of dismissing, withdrawing and/or otherwise discontinuing the Tennessee Proceedings;

1.2 seek and/or obtain an anti-suit and/or anti-anti-suit injunction and/or a temporary order restraining and/or preventing the Plaintiff from pursuing and/or otherwise enforcing the said valid and binding Arbitration Agreement; and/or

1.3 prosecute, pursue and/or otherwise continue any proceeding against the Plaintiff in respect of any dispute subject to the Terms and Conditions other than pursuant to the valid and binding Arbitration Agreement;

and

2. that they shall provide such assistance and take all steps as may be necessary to dismiss, withdraw and/or otherwise discontinue the Tennessee Proceedings against the Plaintiff."

8. The First to Third Defendants contend that their existing undertakings to the Court and to KPMG should be sufficient to protect the interests of KPMG in relation to the continuation of Tennessee proceedings and the Court should accept the wording of the undertakings as proffered by the Defendants. They contend that the order should simply record that the First to Third Defendants have already provided permanent undertakings dated 6 January 2023 and 10 January 2023.
9. The terms of these undertakings are: "*...not to prosecute, pursue or otherwise continue or take any step against the Plaintiff in respect of any dispute that falls within the scope of the Plaintiff's Standard Terms and Conditions for Advisory and Tax, save for dismissing, withdrawing and/or otherwise discontinuing the proceedings commenced in Tennessee.*"
10. The undertakings given to the Court and to the Plaintiff add that it is the understanding of Mr Majors, Mrs Majors and the Family Trustee that they "*will not be in breach of this undertaking merely by reason of the Fourth Defendant [LLC] continuing with this claim in Tennessee, should the Fourth Defendant succeed on its*

application to the Court to discharge the Interim Injunction granted by the Court on 3 September 2021.”

11. Mr Scorey KC points out that these undertakings, contrary to the terms of the Judgment dated 20 October 2023, do not acknowledge that there is in fact a binding arbitration agreement between KPMG and these Defendants. Mr Scorey KC also submits that it is essential that the terms of any injunction and/or undertaking are precisely defined so that they can be appropriately enforced. He referred to the judgment of Asplin LJ in *Smith v Backhouse* [2023] EWCA Civ 874, where the court held at [34]:

*“(iii) as a matter of general principle, an injunction must be expressed in unambiguous language so that the defendant knows exactly what is forbidden or required by the order and so that the injunction will be enforceable, if necessary, by means of contempt proceedings: see Gee on Commercial Injunctions (7th Ed), chapter 4, section 1 citing Redland Bricks v Morris [1970] AC 652 (666F-667C) citing Kennard v Cory Brothers and Co Ltd [1922] 1 Ch 265 at 274; and (iv) an undertaking is a very serious matter with serious consequences the breach of which can lead to a fine or imprisonment. **It should be recorded in writing in full and clear terms and although there may be room for argument as to its interpretation, the circumstances in which such arguments can be raised should be kept to a minimum: Zipher v Markem Systems Limited [2009] EWCA Civ 44 at [19].”** (emphasis added)*

12. The Court is persuaded that there is no sufficient reason why the terms of the undertakings should differ from the terms of the permanent injunction, both intended to achieve the same result. This is particularly so as the Court is in principle prepared to grant a permanent injunction against the First to Third Defendants. The differences in wording of the undertakings and permanent injunction are bound to lead to arguments that they were intended to achieve different results. In the Court’s view such arguments should be avoided, and the undertaking should be given in terms of paragraph 1 at [7] above. The Court does not order that the undertakings should include the terms of paragraph 2 at [7] above. In the event the First, Second and Third Defendants are not prepared to provide the undertakings in the above terms, the terms

of the permanent injunction set out at [1] of the Judgment will continue to apply to them.

13. In the event that the Court of Appeal allows the appeal by the Fourth Defendant, no doubt the Court of Appeal will consider what role, if any, the First to Third Defendants can properly play by reason of their relationship with the Fourth Defendant.

Costs

14. The parties are agreed that having regard to the terms of the Judgment, at least the Fourth Defendant should pay the costs of KPMG and that those costs should be assessed on the indemnity basis. The Court considers there is no sufficient reason why the same order should not be made against the First to Third Defendant up to 13 January 2023, the date when the undertakings were given to the Court and KPMG. The Court so orders.

15. The real substantive contention between the parties is whether KPMG should be required to pay the costs of the First to Third Defendants after they have offered the undertakings on 13 January 2023 and as set out at [9-10] above.

16. Mr Jarvis KC points out that the First to Third Defendants provided signed undertakings to KPMG and the Court and in the circumstances, there was actually no justification for KPMG proceeding further against these Defendants and seeking a final injunction against them at any time after 2 December 2022 at the very latest (when they provided the draft undertakings to the attorneys for KPMG).

17. Mr Jarvis KC submits that in the circumstances KPMG is not entitled to recover the costs that it incurred in seeking a final injunction against the First to Third Defendants; and moreover, is liable to pay the costs incurred by the First to Third

Defendants in resisting a final injunction which, he submits, should be awarded on the indemnity basis.

18. Mr Scorey KC submits that the position of the First, Second and Third Defendants is unprincipled in that all the Defendants opposed the granting of a permanent injunctive relief, including denying that they were parties to arbitration agreements (save for the First Defendant). Contrary to the position taken by the First to Third Defendants, the Court found that all parties were bound by the arbitration agreement and in principle a permanent injunction should be granted against all the Defendants. In those circumstances, Mr Scorey KC submits, there is no basis on which they are entitled *qua* wrongdoers to their own costs.
19. Mr Scorey KC points out that the revised undertakings were offered on 31 January 2023 and the Defendants accepted that the adequacy and/or appropriateness of the proposed undertaking was a matter for the Court which would need to be determined at the substantive hearing.
20. Further, Mr Scorey KC submits that the First to Third Defendants' contention that they should be awarded their costs, including the costs of the hearing bears little resemblance to what actually took place at the hearing. Mr Scorey KC correctly points out that these Defendants did not join in the Summons seeking to discharge the Interim Injunction. There was no substantive discussion and submissions made at the hearing as to the appropriateness of the undertakings given by these Defendants. The Court accepts that the debate focused entirely on the LLC with the discussion of the Second and Third Defendants limited to whether the First Defendant, in addition to acting as agent for the Second and Third Defendants, also acted as agent for the LLC.
21. Finally, Mr Scorey KC submits, and the Court accepts that the costs incurred in respect of the First, Second and Third Defendants would likely have been incurred in any event in respect of LLC.

22. In relation to the application for costs the Court accepts that (i) contrary to the position taken by the Second and Third Defendants, the Court has found that all the Defendants are bound by the arbitration agreement; (ii) the First to Third Defendants did not seek to set aside the Interim Injunction; (iii) the Court was in principle prepared to grant a permanent injunction against all the Defendants; (iv) there was no or little discussion and/or submissions at the hearing in relation to the appropriateness of the undertakings given by the First to Third Defendants; (v) the Court is persuaded that no substantial costs have been incurred on behalf of the First to Third Defendants which would not have been incurred in any event in respect of LLC. In light of these facts and circumstances the Court considers that the just result is that there should be no order as to costs in respect of the costs incurred by the First to Third Defendants after 13 January 2023 including the costs incurred in relation to attendance at the hearing on 20 October 2023.

23. The Court provisionally orders that there be no order as to costs in relation to this hearing but will hear any party who wishes to contend for a different result, if such an application is made within the next seven days.

Dated this 22nd day of November 2023.



NARINDER K. HARGUN
CHIEF JUSTICE