Neutral Citation Number: [2019] EWHC 1715 (Comm)

Case No: CL-2014-000070

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

Royal Courts of Justice,
The Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 02/07/2019

Before :

MR JUSTICE JACOBS

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Between :

(1) ANATOLIE STATI	**Claimant**
(2) GABRIEL STATI	
(3) ASCOM GROUP S.A.	
(4) TERRA RAF TRANS TRAIDING LTD	
- and -	
THE REPUBLIC OF KAZAKHSTAN	**Defendant**

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- -

No attendance for the **Claimant**
Ali Malek QC and Paul Choon Kiat Wee (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 1st July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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MR JUSTICE JACOBS

Mr Justice Jacobs :

A: Factual background

1. There are two applications before the Court on behalf of the Defendant, the Republic of Kazakhstan ("Kazakhstan"). The applications arise from the discontinuance, in 2018, of proceedings commenced in February 2014 by the Claimants (who have been collectively referred to, and to whom I will refer, as "the Statis"). These applications are for (i) costs to be paid on an indemnity basis, and (ii) for a payment on account of their costs.

2. The present proceedings have given rise to two reported judgments of Robin Knowles J. in 2017 [2017] EWHC 1348 (Comm), [2017] 2 Lloyd's Rep 201 ("the 2017 judgment") and in 2018 [2018] EWHC 1130 (Comm), [2018] 1 WLR 3225 ("the 2018 judgment"). The latter judgment was, in part, reversed by the Court of Appeal in August 2018: [2018] EWCA Civ 1896, [2019] 1 WLR 897. The background to the litigation is sufficiently described in those judgments, and it is not necessary to repeat it in detail here.

3. In summary, in February 2014 the Claimants issued an arbitration claim form seeking the enforcement of a Swedish arbitration award against Kazakhstan. On 28 February 2014, Burton J. granted permission to enforce the award on the Statis' without notice application. In April 2015, Kazakhstan applied to set aside the order of Burton J. At that time, there were three grounds for challenge: these "original grounds" concerned (i) the appointment process and composition of the tribunal, (ii) a failure to comply with a cooling-off period, and (iii) alleged procedural errors. In late June 2015, or shortly thereafter, Kazakhstan received various documents, as a result of proceedings in New York, which gave rise to a further and more significant ground for challenge, namely that the arbitration award had been procured by fraud. This further ground was the subject of an application within the present proceeedings, on 27 August 2015, to amend the grounds for challenging the award. The amendment application was made shortly before the hearing of the application to set aside the order of Burton J. was due to be heard, on 1 September 2015. At that hearing, Popplewell J. stayed the proceedings pending the outcome of Kazakhstan's challenge to the award which was at that stage underway in the courts of the Sweden, which was the seat of the arbitration. He ordered that both applications should be relisted once the Swedish court had ruled.

4. On 9 December 2016, the Swedish court handed down its judgment in the Swedish proceedings, and dismissed Kazakhstan's claim to invalidate or set aside the award, including on the basis that it had been obtained by fraud. The application to set aside, and to amend that application, which had been stayed by Popplewell J. then came back before the Commercial Court in February 2017. A hearing took place on 6-7 February 2017. This was a substantial hearing, and I was told that some 45 files of material were submitted to the court. Robin Knowles J. gave his 2017 judgment on 6 June 2017. The judgment records that the three original grounds of challenge were no longer maintainable in the light of the decision of the Swedish court: see paragraph [9].

5. However, the judge held, having reviewed the evidence in detail, that Kazakhstan had established a prima facie case that the award was obtained by fraud. He also held that Kazakhstan did not have, and could not with reasonable diligence have obtained, access to the evidence of the alleged fraud on which it now sought to rely, and that the evidence

of the alleged fraud could not with reasonable diligence have been discovered before the award. He also rejected an argument based on issue estoppel arising out of decisions made, in favour of the Statis, in Sweden and the US. He therefore directed that Kazakhstan's claim, that the award was obtained by fraud, should proceed to trial, and he gave directions leading to trial by an order dated 27 June 2017.

6. The proceedings then continued, essentially in the usual way and with nothing remarkable, for the next 8 months. In July 2017, the trial date was fixed to commence some distance away, on 5 November 2018, with a time estimate of 8 days. Pleadings were served: Kazakhstan served Points of Claim in August 2017; the Statis served Points of Defence in September 2017; and Points of Reply were served on 7 November 2017. A Request for Further Information ("RFI") was served in January 2018, and responded to on 22 February 2018, albeit inadequately (as the court later held). The parties were due to provide standard disclosure on 22 February 2018. But, on that date, and after having received Kazakhstan's disclosure list, the Statis said that they needed an extension of the deadline to 1 March 2018. This was agreed on the basis that there was voluntary disclosure of documents already identified as disclosable. On 23 February 2018, the Statis couriered copies of these documents to Kazakhstan.

7. Thereafter, the case took an unheralded and, on any view, unusual turn. Without prior warning, the Statis served notice of discontinuance on Kazakhstan on 26 February, just a few days prior to the extended deadline for disclosure. Kazakhstan challenged this discontinuance, and contended that the case should proceed to trial. In his 2018 judgment, delivered on 11 May 2018, Robin Knowles J. agreed with Kazakhstan. He set aside the notice of discontinuance. Later in the month, he gave various consequential directions, including an order for the provision of further information in response to the RFI. By this time, the Statis were representing themselves, since their former solicitors King & Spalding ("K&S") had come off the record, albeit that Kazakhstan contends that they were clearly continuing to assist in the background.

8. The Statis obtained permission to appeal against the 2018 judgment on 6 July 2018, in part only, and the case came before the Court of Appeal on 31 July 2018. Judgment was delivered on 10 August 2018. The Court of Appeal allowed the Statis' appeal, and accordingly held that there had been a valid notice of discontinuance which should not be set aside. The order of the Court of Appeal records the undertaking of the Statis "not to seek to pursue further enforcement proceedings in this jurisdiction in respect of the Award". The order of Burton J, who had originally granted permission to enforce the award in 2014, was set aside. Accordingly, it is clear that Kazakhstan has been completely successful in bringing about the termination of the present proceedings in this jurisdiction, albeit not on the original grounds of challenge. But litigation in relation to the award continues in other jurisdictions, where the Statis have achieved a measure of success.

9. In the period between the 2018 judgment of Robin Knowles J. and the decision of the Court of Appeal, when the present proceedings were still in existence, there were various developments. In June 2018, the Statis provided disclosure of a very large number of documents, albeit that a large number were also withheld from disclosure on the grounds of privilege. Kazakhstan contends that this was a "document dump" which included much irrelevant material, albeit that they contend that some of the documents are useful to their case on fraud. The deadline for exchange of witness statements was 10 July 2018. Kazakhstan served two witness statements of fact. The Statis said that

they would not be serving any statements of fact. This meant that there was no witness, on their behalf, who would speak to the allegations of fraud.

10. The order of the Court of Appeal provided that there should be no order for the costs of the appeal, but that Kazakhstan should pay the Statis' costs of the application leading to the 2018 judgment of Knowles J. The judge had originally awarded such costs to Kazakhstan, and had summarily assessed them at £ 250,000. The costs of the Statis for that hearing were £ 217,862, and Kazakhstan accepts that some proportion of these costs (50%) should be taken into account and set off when computing the amount of any payment on account in their favour.

11. The Court of Appeal also ordered that the matter should be remitted to the Commercial Court for determination of Kazakhstan's application for an order that the Statis pay the costs of the proceedings prior to the date of the notice of discontinuance on an indemnity basis and for a payment on account. Kazakhstan's application for such costs was made on 22 November 2018, and was supported by a witness statement of Mr. Philip Carrington. Mr. Anatolie Stati, the First Claimant, responded (in his second witness statement) on 25 January 2019. Mr. Carrington served further statements, relevant to the present issues, in March and June 2019. Mr. Stati responded to the most recent statement with his fourth witness statement dated 28 June 2019. This was sent to Kazakhstan's solicitors, Herbert Smith Freehills LLP, under cover of an e-mail dated Friday 28 June 2019 from Mr. Grigore Pisica, the Head of the Legal Department of the Third Defendant. The email said: "We demand that these attachments should be added to the Bundle and shown to the Judge at the hearing next week".

12. Kazakhstan served a skeleton argument on 24 June 2019 in support of the application. This was signed by Mr. Ali Malek QC and Mr. Paul Choon Kiat Wee. The Statis did not serve a responsive skeleton argument. But it is clear from the e-mail sent on 28 June 2019 that the Statis were aware that the hearing was due to take place this week, and indeed they served a further statement with a request (or demand) that it should be provided to the court. There can be no doubt that the Statis are fully aware of the application and the date fixed for the hearing, and there has been no request for an adjournment. I am satisfied that the Statis have decided that they did not wish to attend the hearing, and that it is appropriate to proceed in their absence, applying the principles in *R v Jones* [2002] UKHL 5. It does not of course follow, however, that Kazakhstan is automatically entitled to the relief sought. Oral submissions were made by Mr. Malek (in relation to indemnity costs) and Mr. Wee (in relation to payment on account) over the course of around three hours on Monday 1 July, during which time I asked a number of questions which I considered to be relevant to the applications being made.

B: Indemnity costs – legal principles

13. In order to award indemnity costs in favour of a party, the case does not have to be "exceptional". Rather, the question is whether or not there is some conduct or circumstance which takes the case out of the norm in a way which justifies an order for indemnity costs. The concept of "out of the norm" denotes something which is outside the ordinary and reasonable conduct of proceedings: see *Whaleys (Bradford) Ltd. v Bennett* [2017] EWCA Civ 2143, paras [19] – [20] and [28]. Some of the many authorities in this area were cited in the recent decision of Hildyard J. in *Hosking v Apax Partners llp* [2018] EWHC 2732 (Ch), [2019] 1 WLR 3347. The concept of "out of the norm" has been equated with, or at least includes, conduct of a party which is at

a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to order indemnity costs.

14. *Hosking* also shows that an order for indemnity costs can be made in circumstances where a claim has been discontinued prior to judgment. But, as Hildyard J. explains at [44] – [49], the application of the principles in that situation is made more difficult because the court will not have assessed all the evidence and reached an adjudication, and the reasonableness (or not) of the way the case has been conducted may be more difficult to assess.

15. Where a party has unsuccessfully made and pursued fraud allegations to trial, the court is very likely to award indemnity costs: see *Clutterbuck v HSBC plc* [2015] EWHC 3233 (Ch). Where a claimant has alleged fraud against a defendant and succeeded at trial, the court may also be inclined to order indemnity costs, particularly if (as is likely to be the case) the fraudulent defendant has conducted his defence by telling lies: for a recent example, see *Kazakhstan Kagazy PLC v Zhunus* [2018] EWHC 369 (Comm).

16. Neither of these situations applies in the present case. The Statis have not alleged alleged fraud and failed. Allegations of fraud have been made against them, but these have not finally been determined. Furthermore, in the course of his 2018 judgment, Robin Knowles J. rejected Kazakhstan's submission that the case had been discontinued because the Statis had no answer to the claim. The judge rejected certain explanations for discontinuance put forward by the Statis, and then said at [25]:

> "25. Should I accept the alternative explanation urged by Mr Malek QC, that the real reason for the notice of discontinuance is that the Statis have no answer to the question that has been directed to be tried here? I do not believe that I should go that far. Whether there is an answer to the question is a matter for the trial. I am however prepared to hold that the real reason for the notice of discontinuance is that the Statis do not wish to take the risk that the trial may lead to findings against them and in favour of the State."

C: Kazakhstan's submissions

17. Kazakhstan submits that the present case is out of the norm, and is an extreme case which merits an order for indemnity costs, for 8 reasons. In summary, these are as follows:

    a) The Court has already found that there was a prima facie case that the award was obtained by fraud. By discontinuing, the Statis have elected not to attempt to dislodge this finding. They wish to evade further scrutiny in this jurisdiction, no doubt with an eye on continuing proceedings elsewhere.

    b) Discontinuance has deprived Kazakhstan of its opportunity of proving and vindicating its fraud allegations in this jurisdiction.

    c) Robin Knowles J. rejected the explanations previously provided by the Statis for discontinuing. Those explanations concerned (i) difficulties

with funding and (ii) the lack of need for the present proceedings in the light of attachments obtained elsewhere. The Statis have "effectively led Kazakhstan on", and caused it to invest substantially in the proceedings on the understanding that there would be a trial, only to walk away for reasons which Robin Knowles J. held to be untrue.

d) The Statis' pleaded case was unclear, and answers to the Request for Further Information were inadequate. This meant that the Statis' factual answer to the fraud case was unclear. One would have expected the case to become clearer when witness statements were served. But the Statis then took the extraordinary step of not serving such statements. All of this demonstrated that, to use the language of Hildyard J. in *Hosking*, that this case lacked any "real vitality". The discontinuance reflected weakness in the case which was always an incident of the claim.

e) The discontinuance occurred only days before disclosure was supposed to be given under the extended deadline. The discontinuance was driven by a desire to avoid giving disclosure. Subsequently, disclosure was given but this was seriously inadequate.

f) The Statis are continuing to "play games in this litigation" to this day. The documents served by them indicate that K&S are still working, and drafting documents, behind the scenes.

g) Mr. Artur Lungu, a member of the senior management of the Statis' group of companies, has recently given a deposition in the US. This contradicts evidence given by Mr. Anatolie Stati in his second witness statement served in opposition to the application for indemnity costs, where he sought to maintain a case that there had been no intention to mislead KPMG as to whether Perkwood Investment Ltd. was a company related to the Statis.

h) The Statis are continuing to pursue enforcement proceedings elsewhere, including in substance against assets in London, despite undertaking not to pursue further enforcement proceedings in this jurisdiction in respect of the award. This was forum shopping.

18. Mr. Malek expanded upon these submissions orally. He submitted that the enforcement process in England should never have taken place and had suffered a resounding defeat. There was a very strong case to set aside, and the English court was likely, if the case had gone to trial, to have concluded that the award had been obtained by fraud. This was not a case of an early discontinuance. The claim had been continued for some time after the 2017 judgment, and substantial costs had been incurred on the basis that a trial would take place. There was no good reason for the discontinuance. The Statis had walked away from London because the evidence about the fraud was very strong, and they were not prepared to take the risk of losing. It was not an acceptable reason to walk away from litigation in London because the prospects may be better elsewhere. If proceedings are started here, and a party walks away in the face of a strong case of fraud, it is appropriate to award indemnity costs.

D: Analysis and conclusions

19. The present case cannot, in my view, be approached on the basis either that fraud against the Statis had been established, or indeed that there is an overwhelming case of fraud. In his 2017 judgment, Robin Knowles J. went no further than saying that there was a prima facie case of fraud, and that this merited a trial. In his 2018 judgment, the same judge declined to accept the submission that the Statis had no answer to the claim. He held, however, that the real reason for the notice of discontinuance was that the Statis did not wish to take the risk that the trial may lead to findings against them and in favour of the State. I do not consider that any facts have emerged since May 2018 which enable the Court to go beyond these considered findings.

20. In that context, it is true that the Statis did not serve witness statements in July 2018. This was no doubt a carefully considered step, taken in the context of litigation in different jurisdictions. I do not consider that it is appropriate to regard it as an acknowledgment that there was no answer to the claim; particularly bearing in mind that the Statis had enjoyed a measure of success in some jurisdictions in relation to Kazakhstan's attempts to rely upon allegations of fraud. It seems to me that, in all probability, the Statis had decided – consistently with their decision to discontinue – that the risk of proceeding to trial with witness statements upon which there could be cross-examination was not a risk that was worth taking.

21. It is also true that some additional disclosure has taken place, and that Kazakhstan now has the deposition of Mr. Lungu. But I do not consider that these materials now mean that the court can be any more definitive about the strength of the allegation of fraud than was Robin Knowles J. in 2017. As he said in 2018, whether there was an answer to the claim was a matter for trial. I also bear in mind in that context that (as emerged from Mr. Wee's argument in relation to the payment on account) there remained a live issue – on which substantial sums had been spent by Kazahkstan in giving disclosure – concerning whether or not the alleged fraud was discoverable by the exercise of due diligence. The court cannot now form a final view on that issue.

22. Against that background, I consider whether the case is nevertheless one for indemnity costs. I consider that it is appropriate to view that issue by looking at the three phases of the litigation, corresponding to the periods in respect of which Kazakhstan has (as described in more detail below) helpfully divided its claim for profit costs.

23. The first period is 1 January 2015 – 31 August 2015; i.e. the period ending shortly before the hearing before Popplewell J. I do not consider that an award of indemnity costs could be justified in respect of that period. The Statis had an award in its favour, and that award had not been set aside at the court of the seat of the arbitration. It is very difficult to see how it could be said that a party in that position acted unreasonably in commencing proceedings for enforcement in this jurisdiction. Indeed, the Court of Appeal, when considering one of Kazakhstan's arguments, held that the Statis "had the benefit of an award which was valid under its curial law and which they were entitled to seek to enforce in other countries, including England": see paragraph [65]. Mr. Malek submitted, in substance, that this statement by the Court of Appeal was unjustified. However, I do not consider that I should disregard what the Court of Appeal has said, and in any event (with respect) I see no reason to doubt the correctness of that conclusion. I do not consider that Kazakhstan's allegations of fraud, which were only made close to the hearing in September 2015, and on which the court cannot now reach

a determination, mean that these proceedings were improperly commenced or that the Statis were at that stage acting unreasonably in pursuing them. There is nothing at that stage which, in my view, takes the case out of the norm, even bearing in mind the subsequent developments in the litigation.

24. Indeed, it seems to me that there is a strong case for saying that there should be no award of costs in favour of Kazakhstan at all in respect of the work that was carried out during this period in support of the original grounds of appeal. All of those original grounds became unsustainable as a result of the Swedish judgment, and were abandoned by Kazakhstan. Kazakhstan argue that there should be no division as between the different issues raised by Kazakhstan's challenge to the award: there was a single application by the Statis to enforce, and the discontinuance and the undertakings given to the Court of Appeal mean that this application has wholly failed. Nevertheless, I consider that where the challenge was originally based on grounds which were not sustainable, and the fraud ground was only identified and relied upon at a much later stage, the costs award in favour of Kazakhstan should only run from the time when work began, in relation to the UK enforcement proceedings, on the fraud ground. I agree that thereafter there should be no attempt to split the costs into those relating to different issues. I therefore order that the award of costs in favour of Kazakhstan should run from 1 July 2015, which is a week after they obtained an order for disclosure in the US proceedings.

25. The second period concerns the costs between 1 September 2015 and 6 June 2017. This period encompasses the hearing before Popplewell J., and the resumption of the proceedings ultimately leading to the 2017 hearing before Robin Knowles J. By the time of resumption, the Statis had succeeded in Sweden, and also in the United States. The award had therefore not been set aside at its seat. It does not seem at all surprising that the Statis should then pursue the English enforcement proceedings which they had started, and it is again difficult to see that there was anything which was out of the norm, in the sense of being outside the ordinary and reasonable conduct of litigation, at that stage. Even though the Statis lost on the application before Robin Knowles J., I do not consider that there is anything in the conduct of the case which, again even bearing in mind the subsequent developments in the litigation, involved a high degree of unreasonableness or anything out of the norm

26. The third period concerns the period of approximately 8 months following the 2017 judgment of Robin Knowles J., during which considerable costs were incurred on pleadings and in particular disclosure. It seems to me that this is where Kazakhstan's case for indemnity costs is strongest. As a result of the judgment of Robin Knowles J., which was belatedly and unsuccessfully appealed, the Statis knew that the court considered that, potentially at least, there was a very real answer to their case for enforcement in England. Had they reflected on the position and discontinued shortly afterwards, it seems to me that an order for indemnity costs would not have been appropriate: the Statis would have been entitled to say that they had properly reflected on the position in the light of the judgment, and had decided that they no longer wished to pursue the case.

27. However, this is not what happened. Instead, the case proceeded as though a trial would take place, with significant costs being incurred by Kazakhstan. It seems to me that there was nothing that occurred in the period between the decision of Robin Knowles J. in June 2017, and the decision to discontinue in February 2018, which materially

changed. By the time of the directions order which Robin Knowles J. made on 27 June 2017, some 3 weeks after judgment had been handed down, the Statis had had a reasonable time for reflection on the judgment. The risks of pursuit of the English proceedings, which ultimately led to the decision to discontinue, must have been apparent at that stage. It can therefore be fairly said, in my view, that the pursuit of the proceedings after that time was unreasonable and outside the norm. If a decision was going to be made that the risk of pursuing the litigation was too great, it could and should have been made far earlier. I consider it appropriate to order costs on an indemnity basis in respect of the period between 27 June 2017 and the discontinuance in February 2018.

28. I have reviewed these conclusions in the light of the arguments advanced by Mr. Malek, but they do not persuade me to take a different course.

a) I consider that some of the arguments (in particular paragraph 17 (a) and (b) and the emphasis placed upon the fact that the Statis had walked away) were essentially restatements of the fact that this is a case where there has been a discontinuance of the proceedings. But even in the case of discontinuance, the usual rule and starting point is that the successful party recovers costs on a standard basis.

b) Other arguments (in particular the complaints about disclosure, and the points summarised under 17 (f) and (g) above) were focused on events taking place after these proceedings were (pursuant to the decision of the Court of Appeal) validly discontinued in February 2018. Kazakhstan advances no claim for the costs of the proceedings after that time. I agree that events subsequent to discontinuance could in theory cast light on the question of whether the conduct of the proceedings prior to discontinuance was out of the norm. But I did not consider that there was anything in the points relied upon which illuminated that issue here, particularly in relation to the periods when I have declined to order indemnity costs. I also note that, in relation to disclosure, the position is that Kazakhstan has had the benefit of a substantial amount of disclosure which was only received because of its challenge to the notice of discontinuance; a challenge which was ultimately dismissed by the Court of Appeal.

c) I have already set out my views as to the conclusions to be drawn from the Statis' decision not to serve witness statements in July 2018. Again, this decision was made subsequent to the service of the notice of discontinuance whose validity was ultimately upheld by the Court of Appeal.

29. I did not consider that there was any force in the argument about forum shopping. There is no suggestion that the Statis have breached the undertakings given to the Court of Appeal. The epithet "forum shopping" is to my mind inappropriate in the context of proceedings to enforce an existing arbitration award. The Statis are not seeking to have the underlying dispute with Kazakhstan determined in an inappropriate forum. That dispute has already been determined, in the appropriate forum, namely before an arbitration tribunal. There can be nothing objectionable in principle in a party seeking to enforce an award in different jurisdictions. Indeed, this is commonplace in the

context of enforcement of arbitration awards, which by virtue of the New York Convention are (generally) easily enforceable in many jurisdictions. Enforcement in different jurisdictions is legitimate even though enforcement proceedings elsewhere may have an impact on assets held in London.

30. Accordingly, I order that the Claimants shall pay Kazakhstan's costs of the proceedings incurred between 1 July 2015 and 26 February 2018. Such costs shall be assessed on the standard basis, save that Kazahkstan's costs incurred after 19 July 2017 shall be assessed on the indemnity basis.

E: Payment on account

31. CPR r 44.2 (8) provides that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so. There is no good reason not to order a payment on account in the present case. The assessment of a reasonable sum generally involves considering the likely level of recovery subject to an appropriate margin to allow for error: see Christopher Clarke J in *Excalibur Ventures LLC v Texas Keystone Inc and others* [2015] EWHC 566 (Comm):

> "[23]. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.
>
> [24]. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."

32. The costs incurred by Kazakhstan prior to the notice of discontinuance are US$ 4,302,271 in respect of profit costs (equating to £ 3,410,000 at today's exchange rates). The costs were divided in Mr. Carrington's evidence into the following periods, and I again include the sterling equivalent at today's rates:

    a) 1 January 2015 – 31 August 2015: US$ 890,786.20 (£ 705,900)

b) 1 September 2015 – 6 June 2017: US$ 1,056,842.75 (£ 837,450)

c) 6 June 2017 – 26 February 2018: US$ 2,354,595.65 (£ 1,865,800)

33. The total costs comprising the above profit costs plus disbursements of USD 1,623,900.55 and other expenses of USD 175,038.21, amounted to USD 6,101,209.86, (equating to approximately £ 4,835,000 at today's exchange rates). The evidence did not contain a breakdown of the periods in which the disbursements and other costs were incurred.

34. There can be little doubt that costs amounting to nearly £ 5 million is extraordinarily high for a case which (prior to the notice of discontinuance) involved only two hearings: the hearing before Popplewell J. at which a stay was imposed, and the 2 day hearing before Robin Knowles J. leading to the 2017 judgment. Thereafter, the only substantive steps taken by Kazakhstan was to plead out its case and provide disclosure. I accept that the evidence indicates that the disclosure exercise involved a considerable amount of work. I also accept that where a party alleges fraud in the procurement of an arbitration award, the case necessarily requires very careful analysis of the materials and presentation of the case. I can also understand why, as Mr. Wee said, there needed to be co-operation and co-ordination with lawyers in other jurisdictions where enforcement proceedings were underway. Nevertheless, a sum of £ 5 million seems more commensurate with the costs which one would expect from a lengthy trial involving evidence from factual and expert witnesses, rather than a case which (prior to discontinuance) never reached the stage of an exchange of factual evidence.

35. In these circumstances, I consider that there are likely to be very substantial arguments on a detailed assessment as to the reasonableness of the costs incurred, wherever the burden of proof lies, and that it is likely that there will be a substantial reduction in the amount payable. I take this into account in relation to the quantum of any interim payment. I also take into account my decision that Kazakhstan's recoverable costs should start from 1 July 2015: this may well exclude the greater part of the profit costs for the first period, as well as some disbursements. Allowance should also be made for the costs order in favour of the Statis relating to the May 2018 hearing before Robin Knowles J. I see no reason to reduce this allowance below £ 200,000, bearing in mind that Kazakhstan recovered £ 250,000 on a summary assessment for that hearing. I do not think that the 80% figure which Christopher Clarke J. used in *Excalibur*, where a trial took place over many weeks, provides any guide to my approach here.

36. Taking these matters in the round, and without prejudice to what might happen on a detailed assessment, I consider on the present materials that it is reasonable to take a figure of £ 1.5 million as representing the likely level of recovery, prior to credit for costs payable to the Statis, but after allowance for an appropriate margin of error. I therefore order a payment on account of £ 1.3 million.