TRANSCRIPT OF PROCEEDINGS

Ref. CL-2021-000287
NCN: [2021] EWHC 1365 (Comm)

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

7 Rolls Buildings
London

Before THE HONOURABLE MR JUSTICE CALVER

IN THE MATTER OF

INTEGRAL PETROLEUM S.A (Applicant)

- v -

(1) PETROGAT FZA, (2) MS MAHDIEH SANCHOULI, (3) HOSSEINALI SANCHOULI, (4) KANYBEK BEISENOV (Respondents)

MR D PETERS appeared on behalf of the Applicant

The RESPONDENTS did not attend and were not represented

JUDGMENT
14th MAY 2021
(AS APPROVED)

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MR JUSTICE CALVER:

1. This is the applicant's, who I will call Integral, without notice application for a worldwide freezing order, together with associated disclosure orders against the respondents, and an order for service of the worldwide freezing order and the proceedings out of the jurisdiction and by alternative means.

2. The orders are sought in support of a substantive claim which the claimants intend to bring under section 423 of the Insolvency Act, in which they allege that the first defendant, Petrogat, acting by or at the direction of the second to fourth defendants, the Sanchoulis and Mr Beisenov, paid away substantial sums of money for no or inadequate consideration. And secondly, that the purpose in doing so was to put the relevant monies out of the reach of Integral in particular.

3. The brief background to the application is that on 16 September 2017, Integral as buyer and Petrogat as seller entered into a contract for the sale of medium and low sulphur fuel oil. Petrogat's obligations under the contract were guaranteed by Santrade GmbH. Following a tip off, Integral applied ex-parte on notice for injunctive relief to prevent the conversion of its cargo under the contract on 12 January 2018.

4. By the order of Morgan J on 13 January 2018, an injunction was granted. The injunction was then continued by HHJ Waksman, as he was, on 26 January 2018. Three days later, on 29 January 2018, Petrogat and Santrade, in breach of the injunction, converted 37 rail cars of the cargo by diversion to Iran.

5. On 30 April 2018, Integral applied to commit the Sanchoulis for contempt of court for breach of the injunctions, and in a judgment dated 12 March 2020, Foxton J found that in their capacity of de facto directors of Petrogat, the Sanchoulis had indeed, deliberately and consciously breached the injunctions to which I have referred. He considered that this was a case in which committal was appropriate. And on 31 March 2020, he sentenced the Sanchoulis to a term of imprisonment of three months and two months respectively, suspended for a period of 12 months on terms that they commit no further contempt of court in that period.

6. In parallel with the interlocutory proceedings that I have mentioned, by request for arbitration dated 15 January 2018, Integral sought an injunction compelling Petrogat and Santrade to deliver the cargo and damages for conversion, misappropriation or breach of contract and failure to deliver the balance of the cargo. The London Arbitral Tribunal found that Petrogat and Santrade had indeed converted the cargo and made two partial awards in Integral's favour before a final award of a net amount of some 439,000 USD plus costs and interest.

7. Petrogat and Santrade have refused to pay the LCIA awards. Indeed, it is important to note that on 7 November 2019, Stephenson Harwood, solicitors for Petrogat and Santrade wrote to Integral and said as follows:

> "We can confirm that our clients will not be making payment of the sums awarded in the partial award to Integral. Enforcement of those awards will not be fruitful. Our clients fully intend to defend the committal proceedings as they have previously done

> so. In reality, however, they have little concern regarding the result of those proceedings, as they have no need to visit England and Wales."

It goes without saying, that was an extremely contemptuous letter.

8. On 22 November 2019, HHJ Waksman, as he was, entered judgment against Petrogat and Santrade in terms of the LCIA awards dated 3 September 2019 and 4 November 2019 and gave Integral leave to enforce the awards in the same manner as a judgment, pursuant to section 66 of the Arbitration Act 1996.

9. The current total amount outstanding is approximately 1.45 million USD. HHJ Waksman also, on the same day, appointed a receiver by way of equitable execution over Petrogat and Santrade's assets. Petrogat and Santrade have failed to comply with the request of the receiver and to date, no part of the LCIA awards have been paid.

10. The section 423 claim arises in this way. The applicant submits that the transfers were made for no, or inadequate consideration and one purpose at least of the transfers was to put Petrogat's assets beyond the reach of Integral, thereby prejudicing Integral's interest in relation to the arbitration awards.

11. The timing of events strongly supports the submission that the transfers were made for the relevant statutory purpose. In particular, there are six points. First, on 10 April 2018, Integral applied for security for costs in the LCIA arbitration in respect of Petrogat's counterclaim of an alleged breach of contract. Second, on 1 May 2018, the applicant made a committal application seeking an order that the second and third respondents be committed to prison for contempt of court, as I have mentioned, for breach of the orders of Morgan J and HHJ Waksman.

12. Thirdly, on 17 October 2018, Moulder J dismissed the second and third respondent's application for an order, amongst other things, to set aside service of the committal application. Fourth, on 20 November 2018, the LCIA tribunal issued a partial award, finding that Petrogat and Santrade had converted the cargo. Fifth, the first two of the transfers of which complaint is made, with a total value of 500,000 USD were then made on 27 and 28 November, just a week later. And sixth, on 5 December 2018, Petrogat filed submissions in response to an application by Integral for security for the costs of the arbitral proceedings, stating that it had substantial assets, including substantial amounts of cash in its bank accounts.

13. The remainder of the transfers were then made between 6 December, that is the following day, and 3 January 2019. And so, the substantial amounts of cash, the millions of USD that were said to be in its bank accounts appear then to have begun to be moved out of those accounts. The respondents have obstinately failed to disclose the destination of any of the transfers. Indeed, they have stated that events subsequent to December 2018 are irrelevant to the issues of whether Petrogat currently has any assets.

14. It is against that background that the applicant seeks on a without notice basis, a freezing injunction. And it seeks a freezing injunction of around 1.75 million USD, which is equivalent to the total amount owed to Integral by Petrogat, plus a relatively modest allowance for interest and costs.

15. In order to succeed on the application, Integral must of course, demonstrate three things. Firstly, that it has a good arguable case on the merits. Secondly, that there is a real risk that the respondents may engage in asset dissipation. And thirdly, that it is just in all of the circumstances to grant the injunction.

16. So far as a good arguable case on the merits is concerned, I am satisfied that Integral has a good arguable case on the merits against each of the four respondents individually. As I have mentioned, the respondents have refused to say where the money has gone and it is appropriate in my judgment to draw the inference that the payments were made without adequate consideration.

17. The Sanchoulis are de facto directors of Petrogat. They have been involved in previous breaches of the court orders. Indeed, they have been in contempt of court. And in my judgment, there is clearly a strong enough case that if the transfers were made in order to defraud creditors such as Integral, then relief should be granted against them and indeed, against the first defendant.

18. So far as Mr Beisenov is concerned, he is both the owner of Petrogat and it can be seen from the table of transfers which is attached to the witness statement before me of Mr Kosachenko, that the transfers were made as well in favour of him. There is a sufficiently arguable case that relief should be granted against him.

19. Applying the relevant legal principles in the case of each respondent, in my judgment, there is plainly solid evidence of a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. And indeed, I agree with the submission of Mr Peters that Integral is entitled to rely on the fact it has a good arguable case that each of the respondents have participated in transactions defrauding creditors for the purposes of section 423, which is the type of conduct that a freezing order is aimed at preventing.

20. The Sanchoulis have, as I have mentioned, chosen not to cooperate with the courts or indeed, the receiver. They have refused to provide information concerning the destination of the transfer of the monies. And again, that sort of evasiveness is clearly indicative of a real risk of dissipation. Indeed, the fact that Petrogat has defaulted on the LCIA arbitration awards and has brazenly made clear that it refuses to pay those awards and does not believe that Integral will be able to enforce those awards, again demonstrates a real risk of dissipation in my judgment.

21. So, I am satisfied that there is solid evidence that there is a real risk, judged objectively, that a judgment would not be met because of an unjustified dissipation of assets. So far as justice and convenience is concerned, it seems to me that it is undoubtedly the case that that requirement is satisfied by the claimants, on the evidence that I have already mentioned.

22. Whilst it is true that there has been some delay since November 2020 in making this application, that is not in itself a reason to refuse to grant the freezing order, provided that I consider that there is indeed a real risk of dissipation, which I do, see in that regard, *JSC v Pugachev* [2015] EWCA Civ 906.

23. Disclosure of assets may be required in order to give teeth to a freezing injunction. And I am satisfied that in this particular case further evidence in terms of asset disclosure –

and we can discuss the precise nature of that asset disclosure – is necessary in order to give the freezing injunction teeth.

24. And I am fortified in that view as a result of the approach of Stephenson Harwood on behalf of Petrogat, that Petrogat it was said on 5 December 2018 was an active trading company with other contractual counterparties. Whereas, by way of contrast, in the second respondent's affidavit of 16 November 2020, she said that Petrogat remained largely inactive since the end of 2018 and has no extant trading contracts or receivables owed to it by third parties. That sort of inconsistent evidence clearly requires to be clarified on oath.

25. Mr Peters referred me to various points that could be taken against him in terms of full and frank disclosure in relation to the freezing order, both orally and in his skeleton argument at paragraph 39, through to 45. But I am satisfied that none of those matters should lead me not to grant the order sought.

26. So far as service out of the jurisdiction is concerned, in order to obtain permission to serve out, Integral must establish, (a) a serious issue to be tried on the merits; (b) a good arguable case that one of the jurisdictional gateways in practice direction 6B applies, and (c) that England is clearly or distinctly the appropriate forum for the trial of the dispute.

27. The applicant has undoubtedly, in my judgment, a real prospect of success in respect of the section 423 claim against each of the respondents. The claim is brought under section 423 and accordingly, it falls within paragraph 3.1, subparagraph 20 of practice direction 6B.

28. The real question here, as Mr Peters identified is whether the court ought, as a matter of discretion, to permit Integral to pursue a section 423 claim in this jurisdiction, notwithstanding that none of the defendants are based here or it appears have assets here and of course, the impugned transactions, the transfers of the money took place abroad.

29. The court must look at all the relevant circumstances of the case to ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction which is conferred by section 423. The real question is whether there is a sufficient connection with England to mean that it would be just and proper to make such an order, notwithstanding the foreign element to the claim to which I have mentioned. And of course, that only needs to be established to the necessary standard, which is a realistic prospect of success.

30. Whilst this case is indeed concerned with foreign parties and foreign bank transfers, the case is essentially concerned with an attempt by the respondents to frustrate an award of a London Arbitral Tribunal. Indeed, they make no bones about the fact that that is what they intend to do. And not only a London Arbitral Tribunal but the English court, who has enforced the award of the tribunal, arising out of a dispute that was before that tribunal and court. That, it seems to me, on the facts of this case, affords a sufficient connection to England, see for example *Dornoch v Westminster International* and *Suppipat v Narongdej* [2020] EWHC 3191. It follows, in my judgment, that each of the three requirements for service out of the jurisdiction are satisfied.

31. Finally, Mr Peters raises a question of alternative service and in particular, Integral wishes to serve the claim form and its application notices upon the respondents at various email addresses, as well as by post and courier on the first respondent and by post and courier on the first to third respondents at their solicitors' offices in the Middle East.

32. In the case of the UAE where Petrogat and the Sanchoulis are domiciled, it appears that service must take place through diplomatic channels in accordance with the treaty between the United Kingdom and Northern Ireland and the UAE on judicial assistance in civil and commercial matters. That is the Dubai Bilateral Treaty, with article 10 of that Treaty requiring service through the competent authority, namely the UAE Ministry of Justice. This process, it is said, can take a substantial amount of time.

33. In the case of Kazakhstan, where Mr Beisenov, the fourth respondent resides, CPR 6.40, subparagraph 3 requires service in accordance with the Hague Convention, either by post or through the foreign process section. Service by postal channels, it is said, may take some time and may result in a dispute as to when he received the freezing order. Integral understands Kazakhstan does permit service by email and so, Integral seeks permission to serve Mr Beisenov by email as well as by courier.

34. The court has jurisdiction under CPR 6.15 and 6.37(5)(b)(i), to order service by an alternative method where service is to take place outside the jurisdiction: *Abela v Baadarani* [2013] UKSC 44, at paragraphs 19 to 20.

35. In order for alternative service to be made in circumstances where the defendant is in a Hague Convention country, at least good reason or special circumstances and possibly exceptional circumstances must be shown. The authorities do not speak with one voice as to the correct test, but the most recent consideration of the position in any detail is that of Cockerill J in *Russian Commercial Bank (Cyprus) Ltd v Khoroshilov* [2020] EWHC 1164 at 96 to 97.

36. Thus, special or exceptional circumstances must, it appears, be shown in order to justify an order for alternative service. Those special or exceptional circumstances do exist in the present case. In particular, delay in service of an order of this kind is problematic and more problematic, I agree with Mr Peters, than mere delay in service of proceedings.

37. The matters relied on in support of the application for the freezing order here, in particular, the dishonest conduct of the respondents, at least of the first to third respondents and the fact that the fourth respondent owns the first respondent and owns the companies to whom the transfers were made, seems to me do all constitute special or exceptional circumstances. I bear in mind as well that the applicant does not have the Sanchoulis' residential addresses and so, is unable to serve them personally.

38. Perhaps the most important point in this respect is the fact that the court is making a number of coercive orders in the worldwide freezing order with the risk of committal for contempt. And indeed, the claimant has given an undertaking in damages. It is accordingly imperative that the proceedings should be constituted formally as soon as possible. And since service by email is not prohibited by Kazakh law and the requested alternative means of service by email is therefore valid as a matter of Kazakh law and not prohibited by CPR 6.40(4), I am willing to make the order for alternative service in this case.

This transcript has been approved by the Judge