Neutral Citation Number: [2024] EWHC 3394 (Ch)

Case No: BL-2017-000665

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 4 December 2024

Before:

MR JUSTICE TROWER

- -

Between:

JSC COMMERCIAL BANK PRIVATBANK	**Claimant /Respondent**
- and -	
(1) KOLOMOISKY	**First Defendant/Applicant**
(2) ORS	

- -

MR JAMES WILLAN KC & MR CONOR McLAUGHLIN appeared for the **Claimant / Respondent**
MR MICHAEL BOOLS KC appeared for the **First Defendant / Applicant**

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APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR JUSTICE TROWER:

1. In this application, the First Defendant seeks the permission of the Court to procure Brazaline Ltd, to sell seven aircraft, to Adriyatik Aviation, a Turkish company, for some US$40 million, notwithstanding the present restriction on such disposals by the freezing orders that were granted in the early stages of this litigation.

2. The seven aircraft concerned are grounded at airports in Kyiv, as to six of them, and Odessa, as to one of them. They are not airworthy and are incapable of being flown. There is also a prohibition on domestic flights within Ukraine, which means they cannot be flown quite apart from the fact that they are currently not airworthy. It seems to be common ground that any sale of the aircraft would be for their parts in a deconstructed form.

3. The dispute is not whether they can be sold at all. But rather whether the sale, which is advanced as one which the Court should authorise, is at a sufficient value to justify the Court in granting the relief sought.

4. The contract, pursuant to which the sale is proposed to be effected, was due to complete yesterday. The evidence was that if it was not achieved by yesterday, the buyer was entitled to walk away from the contract. I am told at the hearing today that the First Defendant hopes that, if the Court authorises the sale today, the buyer will not walk away and will still complete on the terms presently put forward.

5. The Bank opposes the application, on the grounds that it has concerns that there is insufficient evidence to show that a proper value has been achieved in the arrangements that had been reached, or the agreements that have been reached, in principle, with Adriyatik.

6. It does so, for a number of reasons. The first is that there is a concern – and I should put these forward all as concerns, rather than established facts – that the First Defendant may only be seeking to extract value for himself, by selling at an undervalue to a potentially associated company.

7. The second, in very broad terms, is that previous valuations indicated that the prospective value of these aircraft, assessed back in 2023 by a valuer called Cirium, was some US$113.65M. The proposed sale price is now only US$40M. This is a very considerable reduction from the original valuation of $113M that was reached in 2023 in the context of a request by the First Defendant for a variation of the freezing orders for another purpose. As to that – and I will come back to this shortly – it is said by Mr Bools, that there is an explanation as to why it is that the valuation might have come in at a higher figure than the US$40 million which is now proposed.

8. The third concern that is expressed in broad terms by the Bank is that the proposed purchaser was unknown to the broker who was handling the sale, AFR (Air Fleet Resources), which itself is a Pennsylvanian company well known in the industry. It is pointed out that not only is Adriyatik unknown to AFR, but it also has no apparent experience of buying aircraft or aircraft parts. I will also come back shortly to a number of other matters that relate to the concerns about Adriyatik.

9. The fourth concern is that there was no fresh independent valuation of the aircraft provided by the First Defendant. In this regard it is also pointed out by the Bank that this could have been obtained because Mr Seymour, who has opined for the purpose of this application on the impact of the effect of long periods in which the aircraft have been parked rather than used, and who gave expert evidence on aircraft valuation for the First Defendant at the trial, has not given even a rough valuation of the market value of the aircraft.

10. The fifth concern draws the threads together on the underlying basic point: the Bank has a real concern that a genuine fair market price has not been achieved.

11. The First Defendant does not deny that the Court needs to consider the true market price, but says in Mr Bools' helpful submissions (supported by his skeleton argument), that the evidence establishes that the purchase price for the sale to Adriyatik was derived from a marketing exercise that was carried out by the independent and reputable broker which I have already mentioned. The Bank does not maintain that AFR is not independent, although the Bank, as I shall come to, has expressed a number of concerns about the way in which that marketing exercise was carried out.

12. Mr Bools also submits that the aircraft are very unusual assets, the value of which cannot be ascertained by a desktop valuation. They are worth what they can actually be sold for – no more, no less – and ascertaining what they can be sold for – no more, no less – is an exercise that has been carried out by AFR, as a result of the negotiations which were carried out with four independent potential purchasers. The winner of that exercise was Adriyatik, who on, in his submission, have achieved both the highest and the best terms for the purchase of these four aircraft.

13. He, therefore, says that if the Court asks itself the question, "Well, what as at today – 4 December 2024 – is the value of the aircraft?", the only answer that the Court can properly reach on the evidence is what a potential purchaser is prepared to pay for them. The market has been tested, and that figure is US$40 million.

14. Mr Bools also submits that, while the Bank refuses to consent to a sale at US$40 million, it puts forward no alternative price. He also submits that the Bank does not challenge the bona fides and independence of AFR, and does not suggest, anyway in terms, that the offers which AFR received were either contrived or anomalous. Nor does the Bank put forward the argument that it knows of any buyers who would have been willing to pay more than Adriyatik is prepared to pay.

15. So far as the Cirium valuations are concerned – that is those which were prepared a year or so ago and assessed the aircraft values at a much higher figure – he submits that the Bank has failed to explain why the valuations are relevant. The Cirium reports were produced in circumstances in which, as has been explained in the evidence, they can only properly be treated as a mechanical exercise, in the form of online valuations, which do not even reach the quality level of a desktop valuation. He says that, for those reasons, the Court should not be surprised if, given the conditions and circumstances in which these seven aircraft are actually held and their condition on the ground, a very significantly lower price has been offered once the participants in the market have actually determined the offers they are prepared to make.

16. Mr Bools then drew the threads together, by saying that once it is appreciated that the Cirium valuations ought to be rejected because they were prepared for a different purpose, in different circumstances and taking into account different considerations, the only evidence is that the sale price of US$40 million to Adriyatik represents the true market price of the aircraft, all of which are depreciating assets.

17. Finally on this aspect of the case, Mr Bools submits that the glaring error that the Bank has made is that it assumes – in defiance of what he says is clear evidence from an aircraft broker (that is AFR) – that it is possible for a valuer in, say, London to provide a meaningful valuation of the aircraft, which are currently trapped by the war in airports in Ukraine. In those circumstances, he says it is striking that the Bank suggests that a further valuation should be carried out before consent to the sale is given. There would continue to be difficulties for any valuer to do any more than give a figure, which the Court can be satisfied is a fair figure, which would be likely to be US$40 million, on the basis of the marketing which has already been carried out.

18. So the First Defendant's submissions can be summarised in this way. The Court is thrown back to the question of trying to work out what the proper values of the aircraft are by reference to the amount that somebody is prepared to pay for them. An aircraft broker and three other buyers, whose independence cannot be questioned, have all concluded that the value is US$30 to 40 million. Given the reasonable approach that was adopted by the independent broker in the sales process – and I should add, that I have been taken by Mr Bools through the correspondence from AFR, to explain what was done – the Court can be satisfied that a proper market value has been achieved.

19. Before I express my conclusions in relation to this question – and I think it is helpful to do it by reference to the five points that were made and developed by Mr Willan in his submissions, and Mr Bools' answers to them – I should explain, albeit very briefly, the approach that the Court has to take on an application of this sort.

20. In *Compagnie Noga d'Importation et d'Exportation SA v ANZ Banking Group* [2006] EWHC 602 (Comm), Christopher Clarke J set out at paragraph 9 of his judgment a number of principles relating to the variation of a freezing order, to enable a transaction to proceed,. I am not going to read out the whole passage, but I will pick out the salient elements in summary form.

21. The first is that the essential test is whether it is in the interests of justice to make the variation sought. The second is that it is for the applicant to satisfy the court that it is appropriate to make the variation sought and to adduce any evidence that is necessary to persuade the court that this is so. The third is that the Court is concerned to examine whether to do so would be consistent with the policy which underpins the jurisdiction, namely that a defendant should be restrained from evading justice by disposing of his assets otherwise than in the ordinary course of business with the result that any judgment goes unsatisfied.

22. I interpose, at this stage, to say that it is not suggested that the disposition in this case would be in the ordinary course of business. Mr Bools accepts that he has to satisfy the Court that this is a transaction, which ought to be permitted in the interests of justice.

23. The fourth is that the correct test is to consider objectively the overall justice of allowing the payment to be made. The fifth then relates to a consideration, which I do not think arises in this case, or there is certainly no evidence that it does. The sixth is that because the Court has already been satisfied of a risk of dissipation, judges are entitled, on an application to vary, to have a healthy scepticism about assertions made by the applicant, particularly where the applicant – or those to whom his evidence or contentions relate – have been less than frank in dealing with the Court or the Claimant.

24. It seems to me that this is helpful guidance for the Court, on an application of this sort. But I also take into account, as Mr Bools pointed out in his skeleton argument, that I have to bear in mind the reality of the underlying position, which he explains as follows. The assets which are sought to be sold are assets in which both Defendants have an interest, but which are subject to a worldwide freezing order. The probabilities are that they are depreciating on a daily basis, and will continue to do so, for the foreseeable future. The assets are vulnerable, not just to depreciation, but also to potential damage or indeed destruction, as a result of external forces beyond anyone's control, and (which I accept) that the First Defendant, therefore has, objectively speaking, good reason for wishing to convert a depreciating and vulnerable asset into something secure, namely cash.

25. Against that background I accept that it is appropriate for the Court to bear in mind the purpose of the freezing order, which is not to prescribe or dictate to the First Defendant how he should or should not, deal with his assets, other than so as to ensure that, if the Claimant should prevail in its claim, the Defendant's assets are available to be executed against to satisfy that claim.

26. Mr Bools then said that, ultimately, the question is whether the Bank has shown that the transaction is manifestly at an undervalue and that it has failed to do that. I do not, myself, accept that that is the correct way of looking at the problem. It seems to me that the real question is whether there is sufficient evidence that this is a proper transaction, i.e. a transaction which is entered into bone fide with a third party, in respect of which the value which is being attributable to the assets falls within a reasonable range.

27. In approaching the answer to that question, I adopt the healthy scepticism that is referred to by Christopher Clarke J, and I should say that, if the only point on which I had to proceed was that an offer had been made by Adriyatik, I would refuse permission. This leads me to the five points that are made by Mr Willan, and on the basis of which I shall explain my conclusion.

28. The first point is that the Bank has real concerns, that are said to be justified, about the identity of Adriyatik as an independent Turkish entity. There is no doubt, from its ownership on paper, that it belongs to somebody unconnected to the Defendants. But I think Mr Willan is entitled to submit that, in this case, both Defendants have a history of using corporate fronts for different purposes, and the Court is obliged to consider, with very considerable care, whether the nature of the entity, which is said to be independent, has anything about it which gives rise to concerns and requires further explanation.

29. There are two matters relating to Adriyatik which give rise to particular concern. The first is that its regular activities have nothing to do with owning aircraft parts. It is involved in the aircraft business, in the most general sense of the word, but there is no evidence that it has any experience or history of owning aircraft parts, or aircraft in various states of disrepair.

30. The second, which is linked to the first, is that it is not a known participant in the market for this kind of asset so far as AFR are concerned. This is significant because it is accepted by both parties that AFR is an expert in this area.

31. I also give some weight to the Bank's concerns about how it is that Adriyatik came into the picture in relation to this proposed sale. Nothing has been seen, or provided by Adriyatik as to why they are getting involved. It is also apparent – or appears to be apparent – that it was Windrose, an entity associated with the Defendants, which introduced Adriyatik to the deal. In my view it is strange, to put it at its lowest, and requires a proper explanation from the First Defendant that Adriyatik has emerged apparently from nowhere, to make an offer in relation to these particular assets. It is also striking, as Mr Willan submitted, that Adriyatik was apparently happy to contract without inspecting the aircraft and did not undertake any form of detailed analysis of what it was buying.

32. For those two interlinked reasons, I think there are real concerns about whether the Court can properly satisfy itself that the chosen purchaser of these assets is actually independent, in the true sense of the word, from the Defendants. But that does not answer the question; rather what it tells me is that I need to approach the remaining evidence with a particularly healthy degree of scepticism. That leads into the next three points that were made by Mr Willan.

33. The first relates to the Cirium valuations from 2023. Mr Willan submits that a comparison with the Cirium valuations remains of relevance, because it was put forward at the time by the First Defendant as an unqualified valuation, albeit for a different purpose. The purpose for which it was put forward, as I understand it, was to assist in making insurance claims in relation to the aircraft. It may well be the case that a valuation in those circumstances was appropriate at the figure of US$130 million because of the purpose for which it was obtained. Mr Bools relies on that possibility in support of his submission that the mere fact that there has been a reduction of two-thirds, from the US$113 million, does not tell you too much, if the circumstances in which the valuation was required in 2023 were different.

34. But Mr Willan still says that the very considerable reduction remains significant. He says that it is difficult for the First Defendant now to rely as heavily, as it does, on the fact that it was an online valuation only. Mr Willan says that, while a reduction of some amount for considerations of that sort might be valid, for the value to drop by two-thirds seems to be excessive, even having regard both to the passage of time and the circumstances in which that particular valuation was carried out.

35. The next consideration was the absence of an independent valuation. I have real concerns about the First Defendant's argument that it is impossible to carry out an independent valuation. The First Defendant has not acquired one, despite the fact that Mr Seymour has been asked to give evidence in relation to the impact of the aircraft

remaining on the apron over several years. He was not asked to produce a valuation and he, himself, does not say that that is something he cannot do.

36. Mr Bools emphasises that a further independent valuation is not something that can properly be carried out without a full-blown inspection. He says that the reason for this is that the true value of these aircraft is very heavily impacted by the conditions in which they have been kept and the fact that they are no longer flightworthy.

37. Mr Willan says that the reality of the position is that the Court can see that the First Defendant does not actually want an independent valuation. I think there is some substance in this submission and I am not satisfied by Mr Bools' answer that it is impossible for an independent valuation to be carried out, nor am I satisfied that it could not have been done during the period between the time at which this issue first became critical and the time at which any contract with Adriyatik had to be completed.

38. All of these points do not necessarily resolve the issue because, as all parties ultimately accepted, the real question in this case is whether there are concerns about the marketing exercise that was carried out by AFR. The straightforward reason for this is that, leaving aside any questions of an independent valuation, the answer to the true market value of these aircraft is what the market would pay if, having regard to all the circumstances, there were to have been sufficient exposure to the market during the course of the process that was carried out by AFR.

39. Mr Bools relies heavily – and in my view correctly – on the fact that it is not said by the Bank that AFR are not independent. However, the process by which AFR were asked to carry out the valuation exercise that they did was, in a number of respects, somewhat surprising. As Mr Willan pointed out, AFR were aware of the Adriyatik offer at the outset of their involvement, and in that context they have said that "Our task was to find a higher offer, if possible. Our self-designed approach, given the stranded / grounded nature of these (7) aircraft, was to look towards the major parts providers and engine lessors."

40. This makes clear that AFR's starting point was that they knew of an Adriyatik offer of between US$35 and 40 million at the time they started the process of exposing the assets to the market.

41. In a letter to Brazaline, dated 30 October, AFR then gave further details of the exercise that they carried out. In a number of parts of that letter, it seems to me that they disclose a real possibility that the market knew that the project – in the form of the sales process that they had been instructed to carry out – was aiming for a US$35 to 40 million figure for the sale of the aircraft. There are a number of parts of what they describe as a series of events that transpired, set out in that letter, which expose that that is the likely approach they took. Thus, one of the participants, or potential participants, is said to have admitted that "they did not have the cash available for a $35-40M project until they would complete a restructuring of their warehousing lines much later in the year, or next year".

42. In another part of the letter, AFR explained that they were "finally able to push Aersale up to the $40M USD price from their starting offer in the mid-30s, along with an "as is" closing with the aircraft in Ukraine,. We felt that it was important from a

psychological perspective to reach a number starting with a 4 … Given the risk and complexity we felt that the $40M number was a good accomplishment". (In the event Aersale did not proceed). Then later on in the same letter, they say, "We had broad consensus, from AJW and Aersale", that is two of the participants, "that they were fine with the $40M USD approved price, subject to being able to get insurance for ferry flights. This was above the mid-30M ($36.5M) price Willis had indicated earlier, and above the $37.5M that Aersale had offered earlier." In my view, these are all indications that the market was affected by an induced supposition, that a figure of US$40 million was the figure for which AFR were aiming.

43. Mr Bools said that there was no real evidence that there was not an independent marketing exercise, and he stressed in his submissions – and I accept – that the Bank has not asserted that AFR were not independent. But I am not convinced or satisfied that the marketing exercise that was, in fact, carried out by AFR was, for whatever reason, a marketing exercise to which I can give the weight that it is necessary to give it for the purposes of overcoming the other concerns and scepticism that I have about the circumstances and the nature of this particular sale.

44. I should also add that I am not convinced that Adriyatik will walk away from the transaction at this stage. Nor am I satisfied that it can be said that no other interested parties are out there or not interested if the Court simply declines at this stage to authorise a sale.

45. In deciding - as I do – that at this stage I am not prepared to accede to the application that has been made by Mr Bools, on behalf of the First Defendant, I take into account that the aircraft are located in a warzone and that all other things being equal, this is a risk factor, which should (and does) have some real weight as to how it is that the Court should proceed. But, when considering the real urgency that is said to arise if the Court does not grant permission here and now, I also take into account the nature of these particular assets, which are, at the end of the day, aircraft where it seems to be common ground, their value lies in their ability to be utilised for spare parts, rather than being flightworthy.

46. So while I am prepared (although with a certain level of hesitation) to give the First Defendant permission, should he wish to do so to come back if he is able either to adduce a proper independent valuation, or with a higher figure, I am not, at this stage, prepared – on the basis of the evidence that has been put before me and in the absence of consent by the Bank - to say that the balance of justice comes down in favour of granting the relief sought.

(Hearing continued – see separate transcript)

(This Judgment has been approved by the Judge.)

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