

FL-2019-000010
7 Rolls Building
Fetter Lane
London, EC4A 1NL
8 June 2023

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
FINANCIAL LIST
Neutral Citation Number: [2023] EWHC 1423 (Comm)

Before
MR JUSTICE PICKEN
BETWEEN:

(1) PALLADIAN PARTNERS LP
(2) HBK MASTER FUND LP
(3) HIRSH GROUP LLC
(4) VIRTUAL EMERALD INTERNATIONAL LIMITED

Claimants

-v-

(1) THE REPUBLIC OF ARGENTINA
(2) THE BANK OF NEW YORK MELLON (as Trustee)

Defendants

Ms Susan Prevezer KC, Mr Alex Barden and Mr James Shaerf (Instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP**) appeared on behalf of the Claimants
Mr Ben Valentin KC, Ms Tamara Oppenheimer KC, Mr Samuel Ritchie and Ms Francesca Ruddy (Instructed by **Sullivan & Cromwell LLP**) appeared on behalf of the Defendant
Mr Adam Zellick KC and Mr Ian Bergson (Instructed by **Reed Smith LLP**) appeared on behalf of the Defendant

JUDGMENT
(Approved)

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400

Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

MR JUSTICE PICKEN: This is a hearing that follows the handing down of a judgment by me on 5 April of this year in a substantial claim brought by four claimants against the first defendant, the Republic of Argentina.

1. This is a consequential hearing which has been listed for today and indeed half of tomorrow, although I hope that tomorrow will not be required, in relation to which a number of matters fall to be considered.
2. The first is a matter that I have already addressed, namely the Republic's application for leave to appeal. I turned down that application and will in due course complete the relevant form setting out briefly my reasons for doing so. I therefore say no more about that.
3. There are other matters which I will come on to address this afternoon concerning costs and the form of the proposed order, but the matter I am currently addressing is an application by the Republic for a stay of the orders which I am making.
4. Those orders consist primarily for an order for payment of some Euro 1.33 billion in respect of what in the judgment is described as Reference Year 2013 and orders for specific performance concerning subsequent reference years.
5. The usual position, it is common ground, is that there should be no stay in the event of judgment being handed down: see CPR 52.16. However, as is clear, a stay can be sought, the burden being on the losing party seeking the stay.
6. There is no issue as to the relevant approach to be adopted in the event of a stay application being made.
7. The Court of Appeal in *Hammond Suddard Solicitors v Agrichem International Holdings Limited* [2001] EWCA Civ 2065 at [22] referred to the court having a broad discretion to grant a stay, the exercise of which will depend on all of the circumstances of the case, "the essential question" being "whether there is a risk of injustice to one or other or both parties if it grants or refuse a stay".

8. As made clear in *Department for Environment, Food and Rural Affairs v Down* [2009] EWCA Civ 257, at [8], as is clear, a stay can be sought by Sullivan LJ, the party seeking a stay must put forward "solid grounds" and, if such grounds are put forward, the court then must undertake a balancing exercise, weighing the risks of injustice to each side if a stay is or is not granted.
9. As the judge went on to explain at [9], the primary focus is on considering whether there is "irremediable harm" if no stay were to be granted. Such irremediable harm needs to go beyond the "temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal". A particular factor which, in the event, does not arise in the present case is whether there is a risk that the appellant will not get back any sum paid in the event of the appeal succeeding. That factor does not apply in this case because it is accepted that, if payment is to be made, it is going to be made into an escrow account and, in those circumstances, there is no risk to the Republic here of not receiving the money in the event that its appeal succeeds.
10. The question, therefore, is, and is only, whether there is irremediable harm that has been established by the Republic in this case or not.
11. Now, as I have indicated, there are two aspects to the relief that I will today be granting in the form of the order which is still to be discussed in detail: first, the payment of Euro 1.33 billion; and, secondly, specific performance.
12. As I indicated during the course of submissions, I have come to a clear view concerning the latter. The conclusion I have reached is that there should be no stay in respect of the specific performance aspects, and I say this for the following brief reasons.
13. First, although there has been some suggestion made in the witness evidence which has been put before me for present purposes, specifically the witness statement of Mr Marco Juan Lavagna dated 15 May 2023, who is the director of the National Institute of Statistics and Censuses (INDEC), that it is not possible for INDEC, and so the Republic, to comply with an order for specific performance, Ms Oppenheimer KC, who has addressed me on the stay application, has invited me to focus not on that aspect of the

witness statement but instead on what Mr Lavagna goes on to say in the separate section, namely that it is possible to perform the relevant exercise but that to do so would require considerable time and expense.

14. I bear in mind what Mr Lavagna has to say in that respect, but the obligation and specifically the cost involved is, on any view, given the scale of the claim that the claimants have brought against the Republic, very modest. Certainly, getting on with specifically performing by the Republic is not going to involve, and Ms Oppenheimer did not suggest otherwise, any irremediable harm to the population of Argentina in the way that she submits would be the case were the Euro 1.33 billion now to be required to be paid.
15. Secondly, I bear in mind that the work which is going to be required to achieve specific performance is going to entail time. As a result, the longer before the work starts the longer it will be for the claimants to obtain that which I consider they should obtain, namely specific performance. Putting that point rather more shortly, I am clear that it is work that should now be got on with and that to delay would be unfair to the claimants, who have established their contractual entitlement in accordance with what I have decided in my judgment. Putting the point differently still, it would, in my assessment, be intolerable for that work to be deferred.
16. In any event, it is work which is unlikely to have been concluded by the time that any appeal has reached its end. In the event that leave to appeal is not obtained from the single Lord or Lady Justice, then certainly what I have just said will be the case, but, even if leave to appeal is obtained, then my understanding, based on what Mr Valentin KC has had to say to me, is that any appeal will likely be heard if not this year then early next, and it is likely, therefore, that any judgment following that appeal will be produced in a timescale which means that conclusion of the specific performance tasks will yet be achieved.
17. Accordingly, there will be no stay in respect of the specific performance aspects of the order that I am making.

18. This brings me to the obligation to pay the Euro 1.33 billion. I have before me an array of evidence from Mr Lavagna, but also from other witnesses, specifically Mr Augustin Torcassi in a witness statement dated 15 May 2023 and Mr Sebastian Antonio Soler in a witness statement dated 17 May 2023, directed at Ms Oppenheimer's submission that to require the payment to be made in full would cause the population of Argentina irreparable prejudice and harm.
19. I should say that Mr Soler appends to his witness statement two reports: one from Mr Eduardo Pablo Setti, who is the secretary of finance within the Secretariat of Finance in the Ministry of Economy; and, secondly, a report from Mr Raul Enrico Regal, who is the Secretary of Treasury within the Secretariat of the Treasury of the same Ministry. Those reports have been objected to by Ms Prevezer KC, on behalf of the claimants, on the basis that they, as a matter of form, ought to have been in the form of witness statements and, as a matter of substance, on the basis that they have raised considerable questions as to what has been asserted.
20. As to the first of those objections, I do not regard it as satisfactory that 'reports' (as described) should be put before the court rather than witness statements, whatever the position might be in Argentina concerning production of 'reports'. We have our own procedural arrangements in this jurisdiction which require evidence, generally at least, to be produced in the form of witness statements. That said, as I indicated during the course of submissions, indeed at the outset, I have considered the 'reports' as though they were in the form of witness statements and do not therefore consider them in any lesser way. I merely point out that for the future it would be better, indeed appropriate, that there should be witness statements rather than so-called 'reports'.
21. A number of matters have been raised by Ms Oppenheimer based on the evidence which has been put before me, which she submits make it appropriate that there be a stay. Specifically, she submits that the Republic will clearly suffer irreparable harm if required to make the payment. She highlights in particular that the Republic is undergoing severe economic problems at the moment and points also to the fact of there being a severe drought that has afflicted the country in recent months, which has made those problems all the more acute. In that respect I have been referred to an IMF country

report in respect of Argentina dated 31 March 2023, which it is true refers in several places to both the economic problems and the severe drought.

22. Ms Oppenheimer goes on, and I take these matters briefly, although they are set out in her skeleton argument at paragraphs 53 onwards, to refer to certain specific points. First, she submits, based on the evidence before me, that the Euro 1.33 billion amount having not been budgeted for by the Republic in 2023, it is now not an amount that can be paid until the appeal process here has been concluded. In that respect she relies on what is said by Mr Rigo in his report at paragraph 8 concerning Article 170 of the Permanent Supplementary Budget Law not being capable of being budgeted for until the appeal process has concluded. She highlights how Mr O'Rourke, the solicitor for the claimants, in his witness statement prepared for the purposes of this hearing, has not taken issue with the law providing as Mr Rigo describes.
23. Secondly, Ms Oppenheimer observes that, in order to effect an increase in the budget for 2023, it would be necessary to identify a source of funding for the increase and enact a law of Congress or obtain the issue of what is known as a DNU, that is an urgency and necessity degree. Again, this submission is based on what Mr Rigo has to say in paragraph 11 of his report. She goes on to submit that, as regards the DNU, because no funding is available to add the Euro 1.33 billion amount to the budget, it would not be legal to enact a special law of Congress to include that amount.
24. She submits, thirdly, that there is no possibility of the Republic being able to raise the funds to make the payment amount on international capital markets, and she takes issue with what is said by Mr O'Rourke in paragraph 49 of his witness statement, concerning various instances where the Republic has, in the recent past, been able to obtain loans. She highlights that those were for specific reasons and they do not support a conclusion that there is finance generally available from international lenders which would enable the Euro 1.33 billion to be paid.
25. Fourthly, Ms Oppenheimer submits that none of the four potential methods by which the Central Bank could provide funds to the national government pursuant to its organic charter would be applicable in this case. The reasons she sets out are in paragraph 61.1 to 61.3 of her skeleton argument, and I do not rehearse them here. Specifically, she takes

issue, as set out in paragraph 62 of her skeleton argument, with what Mr O'Rourke has to say concerning the Republic's so-called cash position. Again, I need not set out the detail.

26. Fifthly and lastly, Ms Oppenheimer submits that, even if a reallocation of the budget were possible, such a reallocation would, in the words of Mr Rigo in paragraph 14 of his report, "create very serious and irreversible harm to the Argentinian population in this fiscal year, in particular in the currently extremely challenging economic environment" and "would undoubtedly require reducing amounts budgeted for other social and population needs". In that respect she has taken me to paragraph 17 of Mr Rigo's report, which sets out the type of reductions which would have to be made to the 2023 budget in the event that the Euro 1.33 billion were required now to be paid. These include 56.5% of the current budget allocated to socio-productive inclusion programmes, 242.3% of the current budget for the social assistance programme aimed at adolescents from low income families that attend universities and other higher education institutions, and other similar matters.
27. All in all, it is Ms Oppenheimer's submission that, when seeking to weigh the balance in accordance with the appropriate approach to a stay application, the balance very firmly falls in favour of ordering a stay. Ms Oppenheimer stresses that this is not a case of the Republic seeking special treatment by dint of its status as a sovereign state but is, rather, a case of the Republic adducing solid evidence, as she would put it, of irremediable harm caused to its population. In those circumstances, when weighing the balance, Ms Oppenheimer urges the court to consider that there is a strong weighting in favour of a stay being granted rather than a stay being refused.
28. In that respect Ms Oppenheimer highlights how it is not suggested by the claimants that they have an immediate need for the use of the Euro 1.33 billion. On the contrary, she observes how the claimants are content, as they are, that the payment be made into an escrow account - in other words, an account which will not be available to them pending the outcome of the proposed appeal.
29. I have considered these various matters with some care. My starting point is indeed that a stay ought generally not be ordered. I bear in mind very much the various submissions

made by Ms Prevezer and the points made by Mr O'Rourke in his witness statement concerning the fact in particular that the Republic appears in the recent past to have been able to obtain funding, and indeed very recently has paid off, in effect, some of its international debt. I take into account therefore that the position may (I stress may) not be as severe as it has been described in the material adduced before me by the Republic. However, it does seem to me, based on that material and bearing in mind nonetheless the burden of proof being on the Republic, that the risk of irremediable harm has been established, at least to some degree, by the Republic and so that it is appropriate that a stay is granted. The length of that stay will, of course, depend on, first, whether leave to appeal is obtained from the single Lord or Lady Justice: if leave to appeal is not obtained, then the stay will be probably very short indeed; if leave to appeal is obtained, then there will be an appeal but, as I have indicated, it seems likely that that appeal will take place in relatively short order. I bear in mind, therefore, that whilst I acknowledge that this is money which the claimants have been described deprived of for some considerable time, nonetheless we are not now talking about that much more further time.

30. Were this a case involving pure commercial entities and not therefore a case where, as here, the Republic has been able to identify at least some irremediable harm, not to itself but to its population, then I would have been in no doubt at all that a stay should have been refused. But that is not this case, and notwithstanding some reservations that I have concerning the evidence adduced before me, I am not satisfied that I should dismiss it. On the contrary, I am satisfied that I should properly reflect that evidence and its import by the granting of a stay.
31. There remains a discrete aspect which I should address, which is Ms Prevezer's alternative submission that any stay should be conditional in the sense that I should order that it is dependant upon the payment into the escrow account that the claimants have suggested that the payment should be made into of a substantial part of the Euro 1.33 billion. Ms Prevezer suggests specifically that I should be considering ordering a condition of the stay that the Republic pay some 25% or so of that amount into an escrow account.
32. In that respect Ms Prevezer has referred me to a decision of Mr Justice Leggatt as he then was, namely *Novus International Aviation v Alubaf Arab International Bank* [2016] 4

CLR 705, [2016] EWHC 1937 (Comm). That was a case which touched on the question of stay of execution at [29] to [35]. Specifically, the judge referred in [33] to a concern on the part of the judgment debtor, Alubaf, that, were Alubaf required to pay the judgment amount, then Novus might not be in a position to repay it. The judge said this at [33]:

"I conclude from the financial information provided that attempting to enforce a court order for repayment of money paid to Novus would be extremely difficult in that, because of the way in which the business has deliberately been structured, repayment would in practice be likely to depend on the voluntary choice of those who control Novus. Whilst it may well be true that, as Mr Kuzbari asserts, the reputational consequence for the Novus Group of defaulting on an English judgment would be cataclysmic, I have no sure way of evaluating that assertion and it seems to me an insecure basis for Alubaf to rely upon."

He then went on to consider the other side of the balance striking exercise by saying this at [34]:

"On the other hand in circumstances where I have refused permission to appeal I think it would be wrong to put Alubaf in a position where it stands to gain from pursuing an appeal by keeping hold of the money owed to Novus for longer. It is also irrelevant that enforcing the judgment against Alubaf would not obviously be straightforward."

He then went on at [35], dealing with the particular considerations applicable to that case as identified at [33] and [34], to say this:

"In the circumstances of this case I consider that a just balance will be struck by granting a stay of execution on condition that Alubaf pays the full amount of the judgment debt together with the sum payable on account of costs into an escrow account where it will be immediately available to Novus if the Court of Appeal refuse Alubaf's application for permission to appeal or grants permission but ultimately dismisses the appeal ...".

33. Ms Prevezer submits that I should adopt a similar approach in this case, although, as I have indicated, her invitation is that I do so by not requiring the full amount to be paid, but a sizable proportion, namely 25%.
34. I recognise and acknowledge that it would be open to me to make such an order. However, I am persuaded by Ms Oppenheimer that the *Novus* case is somewhat different. The balance in that case lay, as described at [33], on the one hand, a concern on the behalf of the judgment debtor, Alubaf, that if the money were paid, Novus might not be good for any repayment and, on the other hand, a concern on the part of Novus that Alubaf would delay by seeking to appeal and therefore Novus would be kept out of its money.
35. Of course, those same considerations apply here, but there is the further consideration of irremediable harm, which I have sought to summarise, caused to the population of the Republic. That puts this case into a rather different category and although, therefore, I have given consideration to acceding to Ms Prevezer's invitation, on balance, I have concluded that justice does not demand that I do so, and indeed that it would be inappropriate for me to do so.
36. In saying this, however, and again as explored in discussion both with Ms Prevezer and Ms Oppenheimer, I recognise that it would be open to the claimants, if so advised, to say to the single Lord or Lady Justice that he or she should consider imposing a condition on the grant of leave to appeal that the Euro 1.33 billion, or a proportion of that amount, be paid. That, however, will be a matter for the single Lord or Lady Justice. It is not matter for me since, as I have indicated at the outset of this judgment, I have myself refused leave to appeal and therefore I have no more to say on that topic. At that stage it seems to me at least, and I may be wrong, that the consideration will be more focused on the relative merits of the proposed appeal, rather than the issues which I have sought to address on the stay application, but I make it clear that at least as far as I am concerned it is open to the claimants to advance that submission before the single Lord or Lady Justice, and nothing I have said in this judgment is intended to stray into that territory.
37. There remains one small further matter, which concerns whether there should be a stay of the detailed assessment procedure as regards costs. I will be coming on to deal with

costs later this afternoon, but in essence what is being asked for is that an interim payment be ordered pending conclusion of the detailed assessment procedure. There is no issue that an interim payment is indeed appropriate, albeit there is a debate about how big that interim payment should be. Ms Oppenheimer submits, however, that it makes no sense at all for the detailed assessment procedure to start whilst there is a proposed application to renew for leave to appeal purposes. Ms Prevezer, as I understand it, recognises that that submission had some force. So do I. In those circumstances, I am prepared to order a stay of that aspect also.

38. As far as the claimants are concerned, they will be getting their interim payment and there is no real prejudice therefore to them, and indeed it is not the best use of resource, time and money to require the parties now to engage in a detailed costs assessment procedure. In any event, whilst not proclaiming any expertise in such matters, it seems likely that that procedure itself is unlikely to be concluded prior to the conclusion of the appeal, even if leave is granted and there is a substantive hearing of that appeal.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Funnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: civil@epiqglobal.co.uk