

Neutral Citation Number: [2023] EWHC 1129 (Comm)

Case No: CL-2015-000396

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 5 May 2023

Before :

HHJ Pelling KC

Between :

Hulley Enterprises Limited and others
- and -
The Russian Federation

Group 1
Defendant

David Peters (instructed by Stephenson Harwood LLP) for Group 1

Hearing dates: **5th May 2023**

RULING

HHJ Pelling KC
(10:08 am)

Friday, 5 May 2023

Ruling by HHJ PELLING KC

1. This is an application on notice for a default order in relation to the filing of witness statements and expert evidence by the defendant to these proceedings, the Russian Federation. The Russian Federation does not appear and is not represented although it has made submissions by a letter dated 2 May 2023, to which I will make reference in a moment.
2. The circumstances which lead to this application, broadly speaking, are these. These are enforcement proceedings in relation to an arbitral award for a very substantial amount of money against the respondent. There is an order made by Mr Justice Butcher on 26 October 2022 which directs that the trial of two preliminary issues which arise in relation to the court's jurisdiction to entertain further resistance to enforcement in this jurisdiction, those issues being (1) whether and to what extent the defendant is precluded by reason of certain Dutch judgments from re-arguing the question of whether it has agreed in writing to submit to arbitration the disputes the subject of the awards; and (2) whether, if the answer to issue 1 is that the defendant is precluded from re-arguing the submission question, the jurisdiction challenge ought to be dismissed forthwith.
3. The context in which that question arises very briefly is that the seat of the arbitration which gave rise to the award which the claimant is seeking to enforce in this jurisdiction was the Netherlands. There was a challenge to jurisdiction in the Netherlands by reference to the issue identified as issue 1 in Mr Justice Butcher's order. All issues relevant to jurisdiction were determined in all courts in the Netherlands up to and including the Court of Cassation in favour of the claimant and against the Federation.
4. Mr Justice Butcher gave directions for the determination of those issues at a trial with an estimate of length of three days and for the filing and service of factual and expert evidence, having given permission to each of the parties to adduce evidence from a single Dutch law

expert on the issue of whether and to what extent the determinations in the Dutch judgments are final and conclusive.

5. The claimants were directed to file and serve their expert evidence in relation to the preliminary issues by 22 December 2022, a direction which, as I understand it, has been complied with. The defendant was directed to file and serve its factual and expert evidence by 4 pm on 15 February 2023 with a view to the claimants filing any factual and expert evidence in reply by 15 March 2023.
6. As I have said already, but repeat, the trial has been fixed for 3 October 2023.
7. The history of this litigation is one, regrettably, of delay and vacillation coupled with explanations for delay and non-compliance with directions which is at best generalised and which does not descend at all to what steps have been taken by the Federation to comply with the directions and why it was that notwithstanding those steps, the directions could not be complied with. These are summarised at some length both in the evidence filed in support of the application and in the skeleton argument of Mr Peters, and I can summarise it relatively quickly. The solicitors who formerly acted for the Federation, White & Case, came off the record following the upheavals in Europe that led to the imposition of sanction regimes both by the United States of America, the European Union and the United Kingdom. This has caused the Russian Federation to maintain it has been unable to obtain adequate legal representation to conduct these proceedings and this has resulted in turn in a number of unparticularised applications to adjourn various hearings, including what is described as the unusual step of trying to adjourn Listing appointments for example for the application to lift the stay which led to Mr Justice Butcher's order.
8. The point which is made by the claimant's solicitors in essence is that on each and every occasion when an application has been made, the broad assertion made by the Federation has been the same, namely that Western sanctions were creating unspecified obstacles in its efforts

to obtain legal representation. No evidence was provided as to what steps had been taken to obtain legal representation or to obtain any required clearance from either the English or the United States authorities to enable lawyers to act in these proceedings on behalf of the Federation if and to the extent such clearance was required.

9. The point which is made by the claimant's solicitors which I accept on the basis of the evidence filed in support of this application is that there are numerous English qualified solicitors based in Russia who could act for the Federation. There are also numerous English law firms based in England and Wales that will accept instructions from Russian clients and in those circumstances a very clear and detailed explanation was required as to why it was that the sanctions regime was providing a real problem.
10. The letter in response to the present application is dated 2 May 2023 and is from the Prosecutor General's office of the Russian Federation. At paragraph 1 of the letter the orders sought has been identified and then the Prosecutor General says, at paragraph 2, that the Russian Federation wishes to make certain observations in response to the application or the points which are relied upon in support of the application, and at paragraph 3 the Prosecutor General says this:

"The Russian Federation apologises for its inability to be able effectively to achieve representation before the English courts in the aftermath of White & Case having come off the record. We have taken active steps to reach out to and engage another law firm so as to replace the solicitor on the record. Lest there be any doubt as to the attitude that is being encountered, the court's attention is drawn to public pronouncements by major law firms ..."

There are then set out a number of quotations released to the media by various law firms on or around the beginning of March 2022 concerning the willingness of those firms to undertake work for clients associated with the Russian State. Those go on over a number of subparagraphs until at paragraph 4 the Prosecutor General says this:

"We continue to make enquiries so as to enable the Russian Federation to replace White & Case as solicitors on the record. We will keep the court and Stephenson Harwood fully informed as and when this is achieved."

11. Pausing there, that is yet another example of an entirely generalised anodyne explanation as to why steps have not been taken to comply with the directions which have been given, which is wholly inadequate in the circumstances of this case, particularly having regard to the fact that the generalised comments from various law firms referred to in the letter are all dated, as I have said, at the beginning of March 2022, and takes no account of the position as it is currently, nor of the availability of the general licence to the extent sanctions are a relevant consideration available in this jurisdiction, or the willingness of the authorities, certainly the United Kingdom, to consider applications for licences in relation to judicial proceedings taking place in England. The letter is not therefore a satisfactory explanation for why it is that there has been a failure to comply with the orders that have been made by this court and I so conclude.
12. The other issue which arises concerns the availability of a Dutch law expert. Broadly speaking, the same points are made in relation to obtaining Dutch expert evidence which starts in the letter at paragraph 5 with an assertion that "*... due to circumstances completely beyond the control of the Russian Federation ... Dutch law expert evidence has been unavailable thus far ...*" It is maintained that the Russian Federation is continuing to make efforts to ensure that such evidence is filed, and then says this at paragraph 6:

"We are compelled to point out that even where sanctions are not engaged in this context, the approach being adopted by the financial institutions in the United Kingdom and elsewhere, as well as potential limitations with regard to insurance for legal professionals, are additional impairments in instructing and receiving legal advice as well as representation ..."

13. There is no evidence which suggests that the professional indemnity insurers of London law firms are refusing to insure law firms in respect of work for Russian clients or the Russian State, and as I have already explained, there is a willingness on the part of the authorities certainly in the United Kingdom to entertain applications for the grant of licences to enable sanctioned individuals and corporations to continue with litigation commenced by or against them in the United Kingdom courts.
14. Further, and relating back to the Dutch law expert issue, a point which is made by the claimants to which there is, as I see it, no answer, is that the Russian Federation was fully represented in all courts in the Netherlands up to and including the Court of Cassation in relation to the issues which were debated before those courts, and it is entirely unclear, in any event there is no explanation, as to why it is that the Russian Federation was able to obtain advice and representation in Dutch law proceedings but is unable to identify a Dutch law expert to assist them in relation to the issues that arise in this litigation.
15. I return therefore to the order which is sought in these proceedings, which is an order that extends the deadline for the filing and service of factual and expert evidence to 2 June 2023 and provides at paragraph 2 of the draft order that unless that deadline is complied with, the defendant will be debarred from filing and serving factual and expert evidence for the preliminary issue trial.
16. A number of points arise about that. The first which concern me is whether or not 2 June was too rigorous a requirement to impose in the circumstances. I am satisfied, however, by Mr Peters' submissions that that would be a wrong approach. There is limited availability from the Dutch law expert retained by the claimant in June, July, August and September as a result of entirely persuasive reasons, including but not limited to childcare responsibilities and professional commitments of a longstanding nature. The fact is that these difficulties would not have arisen had the Russian Federation complied with its obligations under the order made by

Mr Justice Butcher to which I referred earlier. I am satisfied, therefore that, there will be real difficulties created for the claimant unless the extension is limited to 2 June 2023, having regard to the obviously important meetings that may have to take place between the lawyers acting for the claimant and its Dutch law advisers in order to respond to any Dutch law evidence that is filed on behalf of the Federation. I am satisfied in principle therefore that 2 June is an appropriate date to impose.

17. The next question is whether or not there should be a debaring provision such as is provided for in paragraph 2 of the draft order. So far as that is concerned, the principles in relation to the grant of unless orders in this context are well established. They have to be viewed as really the last step in procedural control that should be imposed by the court only as a last resort. I bear in mind, therefore, that a court must be satisfied before making an order in those terms that to make the order is for an identified purpose and that in the context of that purpose, the making of the order is proportionate.
18. I am satisfied in the circumstances of this case that it is plainly appropriate to make an order in these terms. My reasons for reaching that conclusion are as follows. First, the trial is in very close proximity to the dates which are proposed as extensions for the defendant. Secondly, the defendant has had more than adequate time to comply with the directions that were given by Mr Justice Butcher which expired months ago. Thirdly, unless an order in those terms is imposed, the court will not have adequate control over the way in which this litigation is conducted. In particular, unless an order in those terms is made, it is at least possible that the Federation will file and serve or seek to file and serve factual evidence, but much more pertinently expert evidence, very close to the date when the trial is due to commence in circumstances where the choices at that stage will be either to adjourn the trial in order to enable the claimant to deal with the material that has been filed very late, or debar the Federation from relying on material which at that stage will be before the court, and which it will be difficult to debar a party from relying

on at any rate if the evidence is probative on the issues that arise. In those circumstances, as it seems to me, an unless order is the only safe way that adequate control can be maintained by the court. Whilst it is true to say that CPR 32.10 provides a degree of control in relation to factual evidence where witness statements are not filed, the main concern in this case is first to ensure that witness statements are filed and served by the proposed date so that there is no risk of statements being admitted but oral evidence not allowed, which is the effect of CPR rule 32.10, but secondly, and much more importantly, to ensure there is adequate control in respect of expert evidence.

19. I am satisfied in those circumstances that there should be a debarring order proposed. I can think of no other order, short of a debarring order, which will provide the necessary control and avoid the risk which must be avoided at all costs of causing a long fixed trial to be lost simply because of a failure on the part of the Federation to comply with the orders made, and address the non engagement with the process displayed by the failure of the Federation to descend to particulars in relation to why it is they have been unable to obtain Dutch expert evidence and/or legal support from an English qualified solicitor, having regard to the points I have already made.
20. In those circumstances, I propose to make the order sought.