Neutral Citation Number: [2024] EWHC 225 (Comm)

Claim No. LM-2024-000030

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Monday, 5th February 2024

Before:

HIS HONOUR JUDGE PELLING KC
(sitting as a Judge of the High Court)

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Between:

BARCLAYS BANK PLC	**Claimant / Applicant**
- and -	
VEB.RF	**Defendant / Respondent**

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- -

MR. PETER DE VERNEUIL SMITH KC (instructed by **Simmons & Simmons LLP**) appeared for the **Claimant.**

THE DEFENDANT did not appear and was not represented.

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Approved Judgment

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HIS HONOUR JUDGE PELLING KC :

1. This is an application made without notice for an anti-suit injunction and anti-enforcement order, which arises in the following circumstances.

2. In 2005, the claimant, Barclays, entered into an agreement in the 1992 ISDA Master Agreement form with the respondent, a Russian bank. Following the introduction of sanctions against Russian entities and individuals, in February 2022, the defendant became a designated entity as a matter of UK, EU and US law. These events triggered the termination of the agreement and as a result of its termination, as things happened, a substantial sum of money became due and owing from the claimant to the defendant. There is no dispute that at any rate the principal sum is due and payable. However, the bank is precluded from making payment by virtue of the asset freeze provisions imposed by the sanction regulations that apply as a matter of English law.

3. The agreement between the parties contained a provision in the clearest terms, stating that the agreement was governed by and to be construed in accordance with English law. There is an extensive jurisdiction provision within the agreement, which provides for arbitration under the rules of the London Court of International Arbitration as the default dispute resolution mechanism. It provides:

> "... any dispute arising out of or in connection with this agreement, including any question regarding the existence, scope, validity or termination of this agreement ... or this subsection ... shall be referred to and finally resolved under the laws of the London Court of International Arbitration ... which rules are deemed to be incorporated by reference into this subsection."

4. The dispute resolution provision contains in addition, an asymmetric power in favour of the claimant, which enables the claimant to refer any claim that might be made against it by the respondent to the courts of England rather than to arbitration. English law recognises that effect should be given to asymmetric arrangements of that sort if that is the agreement reached between the parties. It is unarguable therefore that the presence of this provision invalidates the dispute resolution clause as a whole at any rate as a matter of English law. In any event, it does not apply on the facts, because as I read that part of the dispute resolution provision, it applies upon true construction only in relation to disputes referred by the respondent, not disputes referred to arbitration by the claimant, Barclays.

5. Notwithstanding these arrangements, proceedings were commenced against Barclays by the respondent before the courts in Russia. That came to a hearing on 5th December last. Prior to that hearing the claimant had challenged the jurisdiction of the Russian courts by reference to the arbitration agreement between the parties and that application was before the Russian court on 5 December. Notwithstanding that, as I understand it, directions were given by the Russian court not merely for the resolution of the jurisdiction issues but also the dispute on its merits at a hearing which is due to take place in a few days' time.

6. In those circumstances, an application is made for an injunction against the respondent, which is designed to do two things. First of all, it is designed to restrain

the respondent from taking any steps to further the claim made by it before the Russian courts and, secondly, to restrain the respondent from enforcing any substantive order made by the Russian courts in relation to the respondent's claim.

7. Turning to the primary relief sought, which is the anti-suit injunction, and as is well-established, but if authorities were required it is to be found in the decision of the Court of Appeal in The Angelic Grace [1995] 1 Lloyds Rep 87, there is a bipartite test to be applied before an anti-suit injunction is granted. The first requires the court to be satisfied to a high degree of probability that there is an arbitration or exclusive jurisdiction agreement between the parties. Secondly, if that hurdle is overcome by the applying party, then the court will generally grant an anti-suit injunction, unless strong reasons can be identified which would make the granting of such an order inappropriate.

8. So far as the first of these issues is concerned, I am entirely satisfied to the standard required, that there is, indeed, an arbitration agreement between these parties that applies to the dispute between the parties. There is some suggestion made on behalf of the respondent, at any rate in the proceedings in Russia, that the arbitration agreement is governed by or is to be construed in accordance with Russian law. As a matter of English law that is unarguable for these reasons. First of all, as I have already said, the agreement is subject to an express term that provides that the agreement be governed by and construed in accordance with the laws of England. True it is that the arbitration agreement, whilst embedded within the substantive agreement, nevertheless takes effect as a separate agreement. However, as a matter of English law, the law of such an arbitration agreement will almost invariably be held to be the same as the governing law of the substantive agreement – in this case English law. In those circumstances, I am satisfied that I should treat the arbitration agreement as governed by English law. In those circumstances, I am satisfied, to the high degree of probability required, that there is an arbitration agreement between the parties that is governed by English law.

9. My attention has been drawn to an argument advanced in the Russian proceedings to the effect that the asymmetric provision, to which I referred earlier in this judgment, has the effect of invalidating the dispute resolution agreement read as a whole. As a matter of English law, I reject that as unarguable because English law recognises that if the parties choose to agree an asymmetrical dispute resolution provision, effect will be given to it as part of the agreement the parties have made. In any event, the asymmetrical arrangement on the facts is irrelevant for present purposes, because it applies, as I construe it, only to references to arbitration by the respondent, not to a dispute as referred to by the claimant.

10. The question, therefore, becomes one of whether, on the material currently available, it can be said that there is any strong reasons why the order that would otherwise be granted should not be.

11. The focus of attention naturally, as in most applications for anti-suit injunctions has been primarily on the delay in commencing proceedings at all and on the progress that has been made in the Russian court proceedings. Broadly speaking, the more progress that has been made in foreign proceedings, and particularly if foreign proceedings have started to become engaged in the substantive merits of the dispute, the less likely it is that the court will be willing to grant an anti-suit injunction which

might be perceived as interfering impermissibly in the conduct of proceedings in a foreign jurisdiction.

12. So far as delay is concerned, I start with the proposition that if otherwise a claimant is entitled to an anti-suit injunction, it would have to be a very strong case before an order would be refused by reference to delay alone. As I explained when giving a ruling earlier in this hearing, the first trigger point at which a challenge to jurisdiction can sensibly be made by the claimant bank was 5th December. It challenged jurisdiction before the courts of Russia at that hearing and has taken reasonable steps to bring on this present application as quickly was legally and commercially practicable. Not unnaturally, the bank has wanted to take extensive advice both in Russia and England in relation to the commencement of proceedings, and more particularly to make appropriate dispositions commercially ahead of making the application. It cannot be said that delay resulting from such activity, ought generally to prevent an anti-suit injunction from being granted, not least because the activity to which I have been referred has been triggered by the failure of the respondent to comply with its agreement that any dispute can be referred to arbitration (or the court whose exclusive jurisdiction had been agreed) and it cannot seriously or credibly be suggested that the claim that the defendant has against the claimant is not a dispute which comes within the scope of the arbitration agreement.

13. The other issue which arises concerns the progress that has been made in the Russian proceedings. In one sense, the answer to that is that there has been very little progress. There has been a single hearing before the Russian court which took place in December of last year, as I have explained. There is a challenge to jurisdiction which has been launched by the bank at the first available opportunity in Russia, which is yet to be determined. Although apparently the Russian court has directed that the hearing on 9 February should be a determination on the merits as well as in relation to jurisdiction, none of the conventional steps one would expect to be taken before a dispute on the merits could be resolved appears to have taken place, not the least of which is the determination of the claimant's challenge to jurisdiction. I accept the submission there has been no waste of Russian resources of any significant level, because there has only been the single hearing before the Russian court that lasted, so I am told, some 30 minutes or so. There has been no determination on the merits. As I have also said, such costs as have been incurred by the respondent in relation to the proceedings in Russia must, of necessity, be limited to the cost of dealing with the hearing in December and of issuing the proceedings. In any event, the fact that the respondent has incurred costs is at best a minor consideration, having regard to the fact that those costs have been incurred as the direct result of a failure on the part of the respondent to comply with its obligations under the arbitration agreement.

14. The other question which arises, at any rate on the basis of materials filed by the respondent in Russia, is a suggestion that the respondent is unable to obtain substantive justice in England and Wales because of the sanctions regime. I reject that as unarguable for the following reasons. First, whilst it is true to say that a designated entity or individual is subject to an asset freeze as a result of the sanction regime that has been imposed by the regulations, that is subject both to permissory general and specific licences. As things currently stand, there is a general licence which permits a party to incur costs by instructing solicitors and counsel and incurring other incidental disbursements in relation to litigation up to a value of £500,000 in the

first instance, without any specific permission being either sought or granted. There is a well-trodden route which enables a party requiring to spend more than that sum on litigation to apply for a specific licence from HM Treasury. Many such licences have both been applied for and granted since the sanctions regime came into place so as to enable parties to participate in a proper manner in relation to English court proceedings. Arbitration proceedings are no different. The English courts have consistently taken the position that the sanctions regime is not a mechanism by which a party subject to sanction should be prevented from litigating to the full extent permitted by the law in England.

15. The only other point I should make is that there is now a well-travelled route, at any rate in relation to state court proceedings in England, which enable parties the subject of sanctions to obtain adjournments and procedural stays of one sort or another so as to preclude the proceedings from progressing until a specific licence application has been determined, if one has been made. It is highly improbable that LCIA arbitrators would approach such an application any differently from that adopted by the English courts.

16. In those circumstances, it seems to me the suggestion that substantive justice could not be obtained in England by a sanctioned body is simply wrong. It will have to go through a number of hurdles and hoops in order to obtain the finance necessary to conduct the litigation properly, but will not suffer any procedural or substantive prejudice as a result of having to take those steps for the reasons I have identified.

17. In those circumstances, it seems to me that there are no obvious special reasons why an order in the usual terms should not be made.

18. So far as the application for an order precluding the enforcement of any judgment obtained from the court in Moscow in breach of the anti-suit injunction I propose to make is concerned, there can be no sensible objection to that, both because of the terms of the agreement between the parties and the terms of the anti-suit injunction I propose to make and, in any event, because the application is being made speedily on any view before any substantive order has been made in the Russian proceedings.

19. The only other point I should consider is futility. Generally speaking, an English court will not grant an injunction or make a mandatory order if to do so would be futile, because they would go unenforced and unobeyed. That is always a concern in an application of this sort. However, I am persuaded that it is appropriate to make the orders sought in the circumstances of this case, because the making of such orders will or at least may provide the bank with protection in the event that judgment is entered in Moscow, contrary to what should be the result of the orders that I have made, and attempts are made then by the respondents to enforce any judgment obtained from the Russian courts in third country jurisdictions. The Russian proceedings should not have been started, and should not be continued with, and any judgment obtained in the Russian proceedings should not be enforced because by starting or continuing the proceedings and seeking to enforce any judgment in such proceedings, the respondent has acted deliberately in breach of contract. The making of the order sought by the claimant emphasise those points.

20. In those circumstances, I am satisfied that it is appropriate to make the anti-suit and anti-enforcement injunctions sought, subject to detailed drafting points to be resolved

following the completion of this judgment by reference to the draft agreement proposed.

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