BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

NC: [2019] EWHC 3057 (Comm)

CLAIM NO.CL-2019-000594

Court No 25

The Rolls Building

100 Fetter Lane

London EC4

Thursday, 31 October 2019

Before:

MR JUSTICE PHILLIPS

BETWEEN:

EVISON HOLDINGS LIMITED

Claimant

-v-

(1) INTERNATIONAL COMPANY FINVISION HOLDINGS

(2) ORIENT EXPRESS BANK PUBLIC JOINT STOCK COMPANY

Defendants

MR V FLYNN QC and MS R DEN BESTEN (instructed by Bryan Cave Leighton Paisner) appeared on behalf of the Claimants.

MR A CASEY and A MCLEOD (instructed by Candey Solicitors) appeared on behalf of the First Defendants.

MS H BROWN QC, MS S PHIPPS and MS V SRIRANGHAM (instructed by Enyo Law) appeared on behalf of the Second Defendants.

Judgment (corrected approved version)

MR JUSTICE PHILLIPS:

1. On 26 September 2019, on the application of the claimant, Evison, dated 20 September 2019, Jacobs J granted an interim anti-suit injunction against the second defendant, OEB, restraining OEB from pursuing a claim it had commenced on 30 July 2019 against Evison in the arbitrazh court of the Amur region in Russia ("the Amur Court") insofar as the proceedings in the Amur Court seek the same relief or involve applications arising out of and/or concerning claims in respect of a framework agreement between Evison and the first defendant, Finvision, dated 26 August 2016.
2. The order was technically made on a "with notice" basis as time had been abridged by order of Cockerill J dated 24 September 2019, which also granted permission to serve the proceedings on both Finvision and OEB out of the jurisdiction and by alternate means.
3. In fact, due to lack of time, OEB did not attend and was not represented at the hearing before Jacobs J. The order made was therefore expressed to be until further hearing, in the event before me, on 15 October 2019.It is common ground that all arguments remain open to OEB and indeed Finvision.
4. Finvision was represented at the hearing before Jacobs J but gave undertakings without admission of liability not to induce or encourage others to pursue or itself take further steps in the OEB proceedings or to commence any further or other proceedings in respect of the framework agreement other than by arbitration pursuant to that agreement.

5. The anti-suit injunction was granted on the basis of arbitration clauses in the agreements between Evison and Finvision relating to the merger in 2016 of Finvision's banking subsidiary, Uniastrum, into Evison's banking subsidiary, OEB. Disputes arose under those agreements, in particular as to Finvision's attempt to exercise a call option to acquire a tranche of Evison shares in OEB sufficient to give Finvision control of OEB when combined with the shareholdings of Finvision's affiliates.

6. The arbitration clauses in the agreements provided for LCIA arbitration in London. Four LCIA arbitrations were commenced in April and May 2018, Sir Christopher Clarke, Richard Spearman QC and Christopher Symons QC being appointed as arbitrators in each of them.

7. Finvision has brought cross-claims in the arbitrations, including three heads of claim seeking damages for alleged wrongdoings of Evison whilst in control of OEB, asserting that such wrongdoings have caused Finvision, damage in its capacity as shareholder of OEB.

8. On 19 March 2019 Finvision commenced proceedings in the Amur Court requiring Evison to transfer the call option shares. Evison obtained urgent anti-suit relief from the Tribunal on 24 March 2019 and orders from Knowles J and Moulder J on 29 March 2019 and 5 April 2019 restraining Finvision from pursuing those proceedings.

9. However, in apparent breach of each of those orders, Finvision proceeded to obtain orders of the Amur Court and on 18 June 2019 duly obtained a 42 per cent shareholding in OEB. When combined with the shareholdings of others described at its affiliates, Finvision thereby acquired control of OEB in

place of Evison.

10. Exercising that control, Finvision appointed Mr Arutunyan as chairman of OEB's executive board (he had previously been the deputy) in place of Mr Nesterenko. The new management caused OEB to commence proceedings against Evison in the Amur Court on 30 July 2019. OEB claimed for the three wrongdoings referred to above as having been included in Finvision's counterclaim in the LCIA arbitrations.

11. Finvision has been added as a defendant to the OEB proceedings of the Amur Court's own motion.

12. Evison's contention, and the basis for its application for an anti-suit injunction, is that Finvision has colluded with OEB to bring the OEB proceedings to impede the LCIA arbitrations. Further, as developed orally by Mr Flynn QC, Evison asserts that the OEB proceedings are particularly unconscionable as they have been brought about by Finvision's contumelious breaches of the orders of this court, thereby wrongfully gaining control of OEB and exercising that control to bring parallel claims against Evison in a non-contractual forum.

13. Evison further points out that the OEB proceedings will require it to engage in two jurisdictions and, given that the Amur proceedings will apparently be concluded within three months, may give rise to issue estoppels binding the arbitration and may lead to Evison being subject to its remaining shares in OEB being seized, OEB already having obtained a freezing order in the interim.

14. OEB resists the continuation of the anti-suit injunction on the merits, contending that OEB is entitled to pursue its own claim in Russia, the natural and only forum where they can be pursued. OEB also contends that Evison

failed to make full and frank disclosure to Cockerill J and Jacobs J so that those orders should be set aside in any event.

15. Finvision's stance is that it disputes that it is engaged in collusion, putting in evidence its letter to OEB requiring OEB to discontinue the Amur proceedings with prejudice. Finvision offers to give undertakings in similar terms to those given to Jacobs J and also offers to undertake not to rely upon any issue estoppel arising from the Amur Court proceedings.

16. In view of imminent deadlines in the Amur proceedings for filing of submissions, I am giving this judgment on an expedited basis.

The legal principles

17. This court will not hesitate to act to prevent a party to an arbitration agreement breaching that agreement by commencing proceedings in a non-contractual forum, exercising its jurisdiction under section 37 of the Senior Courts Act 1981; see, for example, AES Ust-Kamenogorsk [2013] 1 WLR 1889.

18. The more difficult issue which arises in this case is whether the court should restrain a non-party to the arbitration agreement for pursuing proceedings which raise the same or overlapping issues to those which are or might be subject to arbitration.

19. Evison relied on two authorities where an injunction has been granted against a non-party. In BNP Paribas v Open Joint Stock Company Russian Machines, reported at first instance as [2011] EWHC 308 (Comm) and in the Court of Appeal at [2012] EWCA Civ 644 ("the Russian Machines case"), the bank

commenced an LCIA arbitration in respect of its claim under a guarantee. A shareholder in the guarantor company, holding only 0.14 per cent, commenced proceedings in the Moscow Arbitrazh court seeking invalidation of the guarantee. There was evidence that the guarantee and shareholder were in common ownership.

20. Blair J at first instance granted an interim injunction, holding at paragraph 92:

> "In addition, there is evidence from the record that the first defendant has supported the second defendant's case in the Russian proceedings. What is unconscionable cannot and should not be defined exhaustively ... but where companies are in the same ownership and control, it is arguably unconscionable for them to work together to the extent of one bringing court proceedings with a view to impeding the outcome of an arbitration to which the other is a party. Where England is the seat, this may justify the court intervening by way of injunction against both companies, albeit only one is a party to the arbitration agreement, because the conduct of the other party is bound up with the arbitration agreement. Against the non-party also, the court's jurisdiction ultimately rests upon the consensual submission of the dispute to arbitration. On the submissions I have heard, and the material I have seen, I accept the claimant's contention that there is sufficient material to justify drawing the inference that the Russian proceedings are brought with a view to impeding the outcome of the arbitration."

21. The Court of Appeal upheld that decision, Stanley Burnton LJ stating:

> "50. The ground alleged by the Bank as justifying the inclusion of the

Appellant in the anti-suit injunction is its collusion with D1 in bringing and prosecuting the Russian Proceedings. In form, the Russian Proceedings were brought by a shareholder in D1 that is not a party to the arbitration agreement, and D1 is a defendant, rather than a claimant, in those proceedings. The Bank alleges that in fact the proceedings are collusive, having been brought by agreement between D1 and the Appellant for the purpose of defeating or impeding the Bank's right to pursue its remedy against D1 by means of the arbitration proceedings and the enforcement of any award it may obtain in the arbitration. In effect, the Russian Proceedings are a joint venture between the Appellant and D1.
"51. The Bank accepts, as I understand it, that the Appellant is not the alter ego of D1. However, if the decisions made by D1 in the arbitration and in the Russian Proceedings, and by the Appellant in the Russian Proceedings, are in fact co-ordinated decisions made by the same person or persons, then it seems to me that the allegation of collusion would be made out, and it was unconscionable for the Appellant to bring and to pursue proceedings the object of which was to obtain a decision of the Russian Courts on the validity of the Guarantee more favourable in form or effect than in the arbitration to which D1 had agreed to submit the very same question. The ultimate object of D1 and the Appellant would be, of course, to preclude or render more difficult the enforcement of any arbitration award. Such proceedings are vexatious, in that they require the Bank either to incur the costs and risks of litigation in Russia (including any appellate proceedings) in addition to the agreed arbitration, or, if the Bank

were to ignore those proceedings, submit it to what may be an unacceptable risk that its Guarantee cannot be enforced.

22. After considering the evidence, Stanley Burnton LJ, with whom the other members of the court agreed, concluded as follows 57:

> " ... the common control of D1 and the Appellant, the importance of the transactions, the arbitration and the Russian Proceedings, the timing of the Appellant's action in commencing those proceedings, and the improbability of the Appellant acting alone, are in my judgment sufficient to give rise to a serious issue to be tried as to whether or not the proceedings are collusive, so that in fact the Appellant is the stalking horse for D1."
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> "58. ... in the present case in the Russian Proceedings the Appellant seeks the determination of an issue under a contract to which it is not a party that has been validly referred to arbitration; and it is alleged that it is doing so in concert with D1, and is a party to D1's breach of its binding arbitration agreement ..."

23. That decision was applied in Mace (Russia) Ltd v Retansel Enterprises Ltd [2016] EWHC 1209 (Comm), a case in which disputes arising under two tranches of a project management agreement were subject to LCIA arbitration. The parent company of the defendant, however, commenced proceedings in St Petersburg seeking a declaration that the second tranche of the agreement was invalid. In granting an anti-suit injunction, I stated as follows:

> "16. ... In my judgment, the fact that REL owns and controls SPBR is effectively determinative, in the absence of any evidence to the contrary,

of the fact that REL and SPBR are taking a unified approach to the arbitration and the St Petersburg proceedings. Indeed, it is fanciful to suggest that the decision to commence proceedings in the St Petersburg proceedings a few days after the arbitral tribunal was appointed (against SPBR as well as Mace) was not co-ordinated as between REL and its wholly-owned subsidiary, in all probability as between those in ultimate control of both companies. I am satisfied not merely that there is a serious issue to be tried as to such co-ordination, but that there is a high probability that Mace would succeed in establishing it at a trial.

"17. In my judgment the validity of the Tranche 2 agreement is plainly a matter which can and should be determined in the arbitration between Mace and SPBR and the proceedings in the St Petersburg Court brought by SPBR's parent are an improper and unconscionable attempt to subvert that process and render an arbitration award unenforceable in Russia."

24. Mr Flynn contends that these proceedings fall within the principle set out in the above cases on the basis of the evidence of the former chairman of OEB's executive board, Mr Nesterenko and as a matter of inference from the timing and similarities in the claims. He submits that the OEB proceedings are brought by way of collusion with Finvision, any correspondence between those companies suggesting the contrary being worthless window-dressing.

25. He further submits that the OEB proceedings will impede and are designed to impeded the arbitration and are vexatious and unconscionable.

26. That is all the more so, he submits, because they could not and would not have been brought but for the egregious contempt of court committed by Finvision.

27. I have no doubt that the OEB proceedings are but one front in the ongoing corporate battle between Evison and Finvision and their associated companies and affiliates. As was the case in Mace, I consider that there is a presumption the proceedings taken by OEB have been coordinated with its controlling shareholder group, a presumption which is not rebutted by the correspondence I have seen.

28. However, the situation in this case is very different from that pertaining in the Russian Machines case and in Mace. In those cases the Russian proceedings were direct attempts to invalidate the underlying agreements and thereby to frustrate the arbitration proceeding under their terms. They were clearly designed to impede the arbitrations and were, at least arguably, vexatious and unconscionable. Interference in the actions of a non-party in another jurisdiction was therefore necessary and justifiable. In this case however, OEB's claims are its own corporate claims, which only it can bring and only in Russia. Finvision's counterclaims in the arbitrations, based upon the same matters, appear on their face to be for losses purely reflective of those claimed by OEB. Far from impeding the arbitrations, the OEB claims appear to be brought by the proper claimant in the proper and natural forum. It is the Finvision counterclaims which are questionable.

29. In those circumstances, and given that it is not suggested that the OEB claims are other than good arguable claims properly brought, it is difficult to regard them in themselves as vexatious or unconscionable. Indeed, it would be a remarkable step for this court to restrain a foreign public company pursuing its own legitimate claims in such circumstances.

30. Further, I cannot proceed on the basis that the current management of OEB, however their appointment came about, is acting other than in good faith in the interests of OEB. To seek to restrain them from continuing to so act might put them in an impossible position of conflict, one which would be, in my judgment, unjustifiable.

31. Further, the proceedings are also against Mr Michael Calvey, an investor in Evison, who is apparently currently under house arrest in Russia. I see no basis upon which it would be appropriate to order discontinuation of proceedings by OEB against him in respect of his conduct during the time in which he is alleged, through Evison, to have exercised control of OEB.

32. For the above reasons, I am not satisfied that the OEB proceedings are designed to or will impede the arbitration proceedings. But in any event, I do not consider that they can be regarded as vexatious or unconscionable on their own terms. Further, to the extent that there was any separate question of the exercise of my discretion, I consider it would not be appropriate to exercise it so as to injunct OEB from pursuing its own claims in the only available forum.

33. I am, of course, troubled by the apparent flagrant breaches of this court's orders by Finvision, breaches which Mr Casey QC rightly did not attempt to justify or defend, whilst quite properly making no admissions. But, whilst the method by which Finvision obtained control of OEB may well be regarded as unconscionable, I do not accept that that renders subsequent acts of the management installed also unconscionable.

34. In my judgment, Evison must seek other remedies in respect of Finvision's conduct. It has already commenced committal proceedings in respect of the

alleged contempt. It seems to me that Evison may well have a good argument for obtaining an order requiring Finvision to reverse the share transfer, at least pro tem, and to strike out or dismiss the reflective loss claims in the arbitrations. But I express no view as to whether such arguments would succeed.

35. I considered whether it would be appropriate to require Finvision to procure that OEB discontinue the proceedings for so long as it pursues the same matters by way of counterclaim in the arbitrations. However, Finvision has already written to OEB seeking discontinuation of the proceedings and I recognise that, whilst it is affiliates may well have assisted Finvision to gain control of OEB, they are not subject to this court's jurisdiction and may not assist in procuring discontinuance of the OEB proceedings by exercising their shareholding in conjunction with that of Finvision.

36. I therefore determine that the anti-suit injunction should not be continued but should be discharged as against OEB. Finvision has offered an undertaking and I see no reason why that should not be accepted on its terms.

37. In those circumstances, there is little purpose in considering in any detail OEB's challenge to the jurisdiction. But I will state very briefly my reasons for rejecting it.

38. The basis of the application is non-disclosure of a number of aspects of the matter, including a number of the matters to which I have referred in this judgment. The most significant factual non-disclosure alleged may be the fact that Evison did not disclose to the court that on 2 September the Amur Court had rejected an application by Evison disputing the Russian court's jurisdiction.

In my judgment, none of the matters raised could materially have affected the decision of Cockerill J on 24 September to grant permission to serve out, an order which he made on paper. The hearing before Jacobs J was on notice and, as such, I am satisfied that no duty of full and frank disclosure arose.

39. For those reasons, I would not accede to the challenge to the jurisdiction of the court but, as I have already indicated, the application for an injunction is in any event dismissed.