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RECENT ENGLISH COURT DECISIONS CONCERNING FREEZING ORDERS

JSC BTA Bank v Ablyazov and Khrapunov [2018] EWHC 1368 (Comm) and *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 1539 (Comm)

Introduction

This round-up is intended to summarise two recent English court decisions concerning freezing orders handed down in June 2018 on aspects including: (a) court orders compelling disclosure from a defendant regarding the manner in which legal expenses were funded; and (b) a failure to obtain worldwide freezing order relief from the English courts in circumstances where there was only a "*very limited*" link to the English jurisdiction.

(1) *JSC BTA Bank v Ablyazov and Khrapunov* [2018] EWHC 1368 (Comm) (8 June 2018) (Patricia Robertson QC (sitting as a High Court Judge))

During the course of previous litigation commenced by the claimant bank concerning misappropriations committed by Mr. Ablyazov, the claimant's former chairman, Mr. Ablyazov was made subject to a worldwide freezing order on 13 August 2009 (continued on 23 November 2012). Ultimately, the claimant obtained judgments against Mr. Ablyazov.

In the instant action, the claimant bank alleged that Mr. Ablyazov's son-in-law, Mr. Khrapunov, had been part of a conspiracy with Mr. Ablyazov to frustrate the claimant's recovery of the judgment sums and also that Mr. Khrapunov, knowing that Mr. Ablyazov was subject to a worldwide freezing order, had been involved in the diminishing of assets belonging to Mr. Ablyazov. Mr. Khrapunov himself was made subject to a worldwide freezing order on 17 July 2015 (continued on 23 March 2016) that restrained dealings with Mr. Khrapunov's personal assets and with Mr. Ablyazov's assets.

It was Mr. Khrapunov's position that his legal expenses were being funded by his mother, the claimant applied to the court for an order that Mr. Khrapunov provide full disclosure regarding the funding for his legal expenses on the basis that it did not appear that his mother had sufficient means of her own to be able to do so. The claimant also submitted that there was cause to believe that Mr. Khrapunov's legal expenses were being paid by nominees out of (frozen) funds belonging to Mr. Ablyazov or, alternatively, were being paid in breach of the relevant worldwide freezing order using concealed funds belonging to Mr. Khrapunov himself.

The Court granted the claimant's application.

The Judge held that the claimant had shown a "*real risk*" that the worldwide freezing orders were being breached by using monies which might belong to Mr. Ablyazov, funnelled through Mr. Khrapunov's mother and/or a foreign company, in order to meet Mr. Khrapunov's legal expenses. On the basis of such a risk, it was not unreasonable for the claimant to seek disclosure from Mr. Khrapunov for the purposes of testing his mother's witness statement whereby she asserted that she was funding the legal expenses from her own monies. Such an order would assist the claimant to check whether a court order was being breached by the defendants – and the maintenance of the effectiveness of court orders was a powerful factor militating in favour of such an order. Furthermore, the disclosure sought from Mr. Khrapunov consisted of information within his knowledge or reasonable enquiry.

The Court of Appeal had recently dismissed an appeal by Mr. Khrapunov against a court order for his cross-examination in relation to assets owned or controlled by him, and had held that there was a "*good arguable case*" that Mr. Khrapunov had been dishonest in the disclosure provided regarding his personal and non-personal assets. The Judge here held that it would be "*wrong in principle*" to ignore those findings of the Court of Appeal (which were binding upon Mr. Khrapunov). As a result of those findings, the Judge held that the claimant had established a "*good arguable case*" that there were hidden assets concealed by Mr. Khrapunov that he owned or controlled and that such assets were being used to meet his legal expenses (behind the "*screen*" of his mother).

(2) *Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd* [2018] EWHC 1539 (Comm) (20 June 2018) (Butcher J)

The claimant and the defendant were both Seychellois companies. A dispute arising out of construction contracts entered into by the parties was determined by French arbitration proceedings in which the claimant was ultimately successful. The defendant challenged the arbitral award through the French courts but was unsuccessful. The claimant obtained permission from the English court to enforce the arbitral award in the English jurisdiction pursuant to Section 101 of the Arbitration Act 1996. The claimant had also obtained a recognition and enforcement order from the Seychellois court, as well as provisional interim attachment measures. The defendant applied to the Seychelles court for those interim attachment measures to be lifted – that application was granted in February 2018.

The claimant applied pursuant to Section 37 of the Senior Courts Act 1981 and CPR 25.1(1)(f) to the English court for worldwide freezing order relief against the defendant. The defendant argued that the court had no jurisdiction to grant an application for a worldwide freezing order in circumstances where such an application had not been made in the claimant's arbitration claim form and where the claimant's claim had been served without the necessary permission under CPR 62.18(8).

The Court refused the claimant's application for a worldwide freezing order, but granted a domestic freezing order over movable assets of the defendant.

First, Butcher J held that a freezing order claim was ancillary relief that did not need to be contained in an arbitration claim form for recognition and enforcement of an arbitration award under Section 101 of the Arbitration Act 1996 to provide the court with jurisdiction.

Second, Butcher J considered his discretion to grant a worldwide freezing order. Previous case law indicated that, where the English courts were being invited to enforce a party's rights that had been determined outside the English jurisdiction, such orders should not extend beyond the English courts' territorial jurisdiction in the absence of exceptional circumstances. Consideration of whether to grant a worldwide freezing order under Section 25 of the Civil Jurisdiction and Judgments Act 1982 required consideration of factors such as whether there would be an overlap or inconsistency with the primary court's management of the case, whether there was a policy in that jurisdiction against making worldwide freezing orders, whether it was otherwise inexpedient to grant worldwide freezing order relief because of a jurisdictional conflict, and whether the court was in danger of making an order that it could not realistically enforce.

Butcher J considered that in the instant case the links to the English jurisdiction were "*very limited*". Furthermore, the Seychellois court had discharged the interim attachment measures against the defendant. The weight and inherent plausibility of the evidence presented to the court suggested that the Seychellois court remained empowered to order the restraint of assets in the Seychelles – which was a reason for the English court to defer to the Seychellois court as the "*primary court*". Were the English court to grant a worldwide freezing order in those circumstances, Butcher J held, there would be a risk of inconsistent or contradictory orders across the different jurisdictions and would be contrary to the principle of international comity.

However, Butcher J considered that it was appropriate to grant a domestic freezing order. The defendant had conceded that the English court had jurisdiction to order injunctive relief restraining assets within England & Wales. Butcher J considered that a statement made by the defendant's managing director in evidence before the Seychellois court to the effect that the defendant would rather allow itself to be wound-up than satisfy the arbitral award, a transfer of the defendant's shares in an English company to a third party following the claimant's service of evidence referring to the defendant's ownership of those shares, and the fact that the defendant had stated that all of its assets were movable rather than immovable, were all factors militating in favour of a domestic freezing order.