Neutral Citation Number: [2011] EWHC 1820 (Comm)

Case No: 2010 FOLIO 445

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2011

**Before** :

**MR JUSTICE DAVID STEEL**

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**Between :**

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| **MERCHANT INTERNATIONAL COMPANY LTD** | **Claimant** |
| **- and -** | |
| **NATSIONALNA AKTSIONERNA KOMPANIYA "NAFTOGAZ UKRAYINY"** | **Defendant** |

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**The HON MICHAEL BELOFF QC, MR MICHAEL LAZARUS & MR ROBERT PALMER**
(instructed by **HOGAN LOVELLS INTERNATIONAL LLP**) for the **Claimant**
**MR ALEXANDER LAYTON QC & MR MICHAEL FEALY**
(instructed by **SIMMONS & SIMMONS**) for the **Defendant**

Hearing dates: 10th & 24th June 2011

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# Judgment

**MR JUSTICE DAVID STEEL :**

## Introduction

1. The claimant (MIC) asserts that it is the assignee under an assignment agreement dated 28 December 1998 of a substantial debt originally owed by the defendant's (NAK) legal predecessor to Gazprom. The present proceedings are the latest round in MIC's lengthy attempts to recover payment of monies under that assignment which have been outstanding since August 1999.

2. The agreement contains no law or jurisdiction clause. There has, however, been extensive litigation in the Ukraine. The proceedings commenced in 2002. At the third attempt MIC obtained a judgment in its favour in 2006 for a sum in excess of US$24 million inclusive of interest. Attempts by MIC to enforce this judgment in the Ukraine were unsuccessful because in 2005 the Ukraine had enacted a law which imposed a suspension of enforcement notices to protect fuel and energy companies against the execution of judgments.

3. In April 2010 MIC commenced these proceedings in the Commercial Court with a view to enforcing its Ukrainian judgment in England by obtaining an English judgment against NAK at common law. At the same time MIC was granted a without notice domestic freezing order limited to US$25 million. This order bit on a substantial shareholding held by NAK in a UK listed company JKX Oil and Gas Plc.

4. Service of these proceedings was effected pursuant to the Hague Convention in the Ukraine in September 2010. NAK sought to set aside that service on the ground that the exercise by the English court of jurisdiction over the claim would circumvent the domestic law suspending enforcement in the Ukraine. This application was heard and dismissed on 28 January 2011.

5. NAK again acknowledged service of the claim and stated an intention to defend. In the event no defence was served and accordingly MIC entered judgment in default on 28 February 2011. NAK now seeks to set aside that judgment and to have the claim struck out. The basis of this application is that in the meantime NAK had applied to the Supreme Commercial Court of the Ukraine for an order setting aside MIC's Ukrainian judgment from 2006 because of alleged newly discovered circumstances.

6. The new circumstances identified were said to be:

    a) that on 11 February 2011 NAK had become aware that MIC had no legal standing or capacity to make the assignment in December 1998; and

    b) that on 17 February 2011 NAK became aware that the underlying agreement with Gazprom was not signed by its purported signatory, Mr Klyuk, the Chairman.

7. On 7 April 2011 the Supreme Commercial Court granted NAK's application to cancel the Ukrainian judgment by reference to the first of these allegations, namely that MIC apparently lacked standing or capacity to enter into the assignment. The claim was remitted to the lower court for a retrial.

8. On 26 April 2011 MIC submitted its own application to the Supreme Court seeking leave to apply to the Supreme Court of the Ukraine by way of review by that court of the Supreme Commercial Court's decision. That application was dismissed on 31 May on the basis that, since the matter had not been ultimately resolved (given the new trial), the court had no jurisdiction. The next day, on 1 June 2011, MIC submitted an application to the Supreme Commercial Court itself seeking a review of the decision of 7 April also on the ground of newly discovered circumstances to the effect that on 5 May 2011 MIC had become aware that the document that NAK had submitted to the Supreme Commercial Court as being an excerpt from the Delaware Corporation Registry was incomplete and misleading. Further, material furnished by MIC was said to undermine the proposition that MIC lacked standing to make the assignment. This application has yet to be ruled upon.

## The proceedings in the Ukraine

9. In a little further detail the sequence in the Ukrainian proceedings is as follows:-

a) NAK filed its petition for review of the judgment on the basis of newly discovered circumstances on 11th February 2011. This was said to be based upon a memorandum received that very day from the Ukrainian lawyers that a review of the files of the case had led to the receipt of advice from a US law firm, together with an excerpt from the Delaware Corporation Registry. Such was said to reveal that MIC was "*granted the status of good standing by upgrading from its lack of standing as late as 30 January 2002*". Thus it was submitted there was reason to believe that MIC lacked sufficient legal capacity to make the assignment. The court was accordingly invited to cancel the judgment.

b) The petition was accompanied by a copy of a memorandum from the Ukrainian lawyers together with the extract from the Registry. This application was supplemented by a further petition dated 22 February. The application for review was accepted on 23 February and a date fixed for consideration of the application pending which the enforcement of the original judgment would be suspended.

c) MIC filed responsive submissions on 23 March 2011. This in effect made two points, albeit at some length. First, the material adduced did not satisfy the requirements of Article 112 of the Commercial Procedural Code of the Ukraine, and in particular that the threshold requirement that the material was not and "*could not be known to the petitioner at the time of the hearing of the case*". Secondly, evidence was adduced to support the contention that the lack of good standing of MIC only arose on 1 March 2001, and accordingly well after the assignment was executed.

10. Despite that vigorous opposition the Supreme Commercial Court on 7 April 2011 handed down its judgment. The court explained that by virtue of Art. 112 of the Ukrainian Code of Commercial Procedure a review of judgment could be legitimate where the new material adduced was available at the time of the trial so long as it contradicts the decision and both the petitioner and the court were unaware of it and could not have been aware of it.

11. It was accepted that NAK was not aware at the time of the trial of the new material that it had produced relating to the standing of MIC. As regards the submission of MIC that any review of the register would have revealed that the lack of good standing only arose after the assignment was executed, it appears to have been common ground that the Supreme Commercial Court as a cassation court was "*not entitled to establish or deem established the facts".* On this basis it was asserted that the court could only review a court decision based on newly discovered circumstances "*when such review does not entail investigation of the factual information".*

12. In the event the Supreme Commercial Court ruled that the first instance decision should be set aside and the case forwarded for a new trial. As already recorded, an application to appeal that order to the Supreme Court failed on 31 May 2011, it would appear, for want of jurisdiction. The further application to the Supreme Commercial Court filed next day which accuses NAK of having misled the Supreme Commercial Court and also praying in aid the European Convention on Human Rights (to which the Ukraine is a party) is still outstanding.

13. The question that now arises is whether in those circumstances the fact that the Ukrainian judgment has been set aside should be ignored by this court. It is of course NAK's submission that since the Ukrainian judgment has been set aside and a new trial has been ordered, there is no foreign judgment, let alone one which is final and conclusive, which can be recognised or enforced in England and that accordingly the proceedings should be set aside.

14. In response, it is MIC's position that this court should not recognise the decision of the Supreme Commercial Court of 7 April 2011. No other course, it is contended, would be consistent with public policy and/or with the duty upon this court under Section 6(1) of the Human Rights Act 1998 not to act in a way which is incompatible with MIC's Convention rights. Furthermore it is submitted that the judgment in default is a "*possession*" of which MIC cannot unjustifiably be deprived under Article 1 of Protocol 1. In the alternative, even if the court were minded to have regard to the judgment, it should refuse to set aside the default judgment in its discretion under CPR Part 13.3.

## Present application

15. The proceedings in this court took a somewhat unusual course. The hearing was set down for a half day (inclusive of submissions relating to an associated application for a fresh freezing order). In the event the argument on "public policy" as conducted by junior counsel for the parties occupied almost all the available time and the matter was adjourned (accompanied by a request by the court for a copy of the judgment of the Amsterdam Court of Appeal in ***Yukos v. Rosneft*** dated April 2009). When the parties reassembled both sides had instructed leading counsel and the public policy issues were in effect re-argued.

## MIC's case

16. It is at the heart of MIC's case that the principles of legal certainty commensurate with Article 6 required the Supreme Commercial Court to consider both whether there was new credible evidence which if accepted would be decisive in support of NAK's defence and whether such evidence could not have been discovered by due diligence at the time of the original trial.

17. For this proposition, reliance was placed on ***Pravednaya v. Russia*** ECHR Case No. 69529/01, 30 March 2005 which was said to establish the following principles:

    a) It is a fundamental aspect of the rule of law that where the courts have finally determined an issue, the ruling should not be called into question (the "*principle of legal certainty*").

    b) No party is entitled to seek a review of a final and binding judgment solely for the purpose of a re-hearing and a fresh decision.

    c) Revision is only permissible if the applicant shows that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome.

    d) Such a discretion should only be availed upon to correct miscarriages of justice and not to pursue an appeal in disguise.

18. It would appear that the provisions of the Ukraine Code of Commercial Procedure are fully consistent with these principles but MIC complain that the Supreme Commercial Court simply responded to NAK's bare assertion that there were newly discovered facts without more. It ought to have ruled, first on whether the evidence was credible and decisive and second, on whether it could have been discovered by due diligence at the time of the trial. If and insofar as it was outside the jurisdiction of the Supreme Commercial Court to make this assessment, the issues should have been remitted to the lower court leaving the judgment untouched.

19. In the result, it was submitted that the setting aside of the judgment and the remission of the entire case for a new trial of all (and indeed any other new) issues was in clear breach of Article 6. In this regard, MIC cited ***Lizanets v. Ukraine*** ECHR Case No**.** 6725/03 31 August 2007 in support of the proposition that the principle of legal certainty would be overridden if remission of a case permitted the lower court to reconsider the case on the merits regardless of the original justification for re-opening the proceedings.

20. MIC contended that the scale of the challenge to legal certainty was remarkable on the present facts. The Supreme Commercial Court did not make any reference whatsoever to the contention that the person who had purportedly signed the agreement did not do so but NAK proposes to pursue this argument at the retrial. Indeed NAK threatens to raise other new issues, in particular reliance on a case called ***Enterprise Interglass v. Naftogaz*** said to support the proposition that for some unidentified additional reason the assignment was invalid. Yet it is not even suggested that this latter point was not available at the original trial.

21. Thus, it is submitted, it is not arguable that the new trial is a conscientious effort to correct a miscarriage of justice. It is a bare faced appeal, in the form of a re-run of all the matters already considered by the lower court and more. This is in blatant contravention of the principle of legal certainty.

**NAK's case**

22. NAK responded under a number of headings. It was submitted that there had been no breach of Article 6. Any such allegation was premature. It was not accepted that there had been any breach of the certainty principle, merely a remission of that part of the case that was affected by the new material. Such remission was legitimate since it was common ground that it was not open to the Supreme Commercial Court to make any findings of fact. Nonetheless, the court had given careful consideration to all the material put before it, including the submissions and evidence furnished by MIC. In any event the whole theme of MIC's challenge was misconceived since there was no judgment as a matter of Ukrainian law on which to base the default judgment.

23. Taking the last point first, it was the forefront of NAK's case there was no final and conclusive judgment as a matter of Ukrainian law which could continue to form the basis of the English action. In this regard, reliance was placed on the commentary on ***Carl Zeiss (No 2)*** [1967] 1 AC 853 in *Res Judicata Estoppel and Foreign Judgments*, Barnett, para. 2.4.1 which summarised the position as follows:

> "*Accordingly a foreign judgment will not operate as a res judicata in England unless it is a res judicata before the foreign court according to the foreign law.*"

Thus the submission ran there is nothing left to recognise. The only remedy open to MIC (if the setting aside of the original judgment fell foul of Article 6) would be a reference to the ECHR.

24. This was, it was submitted, in contrast to cases such as ***Yukos v. Rosneft*** where an arbitration award has been set aside since such an award is not part of the same court process as the judgment setting it aside. The position there would be governed by the New York Convention which gives a discretion to refuse to recognise an award which has been set aside.

25. Even if this analysis was erroneous, NAK submitted that the non-recognition of the judgment could only be justified if there had been a flagrant breach of Article 6. For this proposition NAK relied on ***Government of USA v. Montgomery No. 2*** [2004] 1WLR 2242.

26. In fact no breach, flagrant or otherwise, it was submitted, had occurred. That was clear from an analysis of the judgment of 7 April:

    (a) MIC had substantial legal representation and had submitted extensive written argument on the question whether the material was "new" for the purposes of Article 12.

    (b) The court states in terms it had examined "the materials of the case" and had "heard explanation provided by the parties".

    (c) The court properly and fully directed itself on the requirements of the procedural code (which was Article 6 compliant).

    (d) It held that the information apparently "defeats" the material on which the original decision was based.

    (e) It records the fact that the court was not "*entitled to establish or deem established the facts*" or determine the reliability of any evidence.

27. Furthermore, it was submitted, the complaint by MIC that the Supreme Commercial Court was acting on mere assertion and failed to make any findings as to the extent to which the new material was decisive or as to the question whether due diligence could have unearthed it for the trial was somewhat inconsistent with the stance adopted in their submissions to the court in March which contended that "*a cassation court may not assess the factual circumstances*", a proposition which the court accepted. In short the earlier complaint was that there had been an investigation not a failure to embark on one.

28. In having regard to the complaint that there had been non-compliance with Article 6, the following matters needed, NAK submitted, to be borne in mind:

a) The issues were fully argued before the Supreme Commercial Court.

b) They will get a full and fair hearing on the retrial.

c) The Ukrainian procedural rules for remission were fully Article 6 compliant.

29. Further it was contended that the retrial will not necessarily be open ended. It can deal with any new arguments based on new evidence. Re-opening of other issues to which the new material is irrelevant would be inconsistent with Article 6. There is no basis for concluding that the Ukrainian Courts would fail in their duty to comply with the Convention.

**Discussion**

30. I start with NAK's threshold submission that, since the Ukrainian courts have set aside the lower court's judgment, there is no judgment to enforce and the English default judgment must by definition be set aside. This, to my mind, simply begs the question. The issue is not so much the enforcement of the original judgment but the recognition of the judgment setting it aside. If the judgment setting aside the judgment of the lower court lacked due process then the default judgment will stand. Indeed a good example of the point is to be found in the judgment in ***Yukos v. Rosneft*** cited above. I reject the suggestion that the fact that it concerned an arbitration award rather than a judgment makes it distinguishable. It is quite clear that the court derived no assistance from the New York Convention: see paragraph 3.4.

31. It is well established that a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy: *Dicey & Morris: The Conflict of Laws, 14 Ed. Rule 44.* Accordingly, if the recognition of a foreign judgment would be contrary to the Convention, recognition will in principle be refused. Indeed this outcome is not so much driven by consideration of public policy as by the terms of Section 6 of the HRA.

32. As explained the relevant judgment for recognition purposes is that which purports to set aside the judgment underlying the English default judgment. Is this judgment vulnerable to the allegation that the proceedings fell short of the guarantees of a fair trial as required by the Convention? I accept that this court should approach this question with some considerable caution. Indeed the presumption must be that the procedures were compliant: ***Maronier v. Larmer*** [2003] QB 620. But I conclude that that presumption is displaced here. There is no escaping the fact that the order of the Supreme Commercial Court involved a clear disregard of the principles of legal certainty.

33. I have not had the benefit of any expert evidence of Ukrainian law to assist in the analysis of the judgment which, in their English translation, are not entirely easy to absorb. However, I conclude that the following primary complaints are made out:

a) The court allowed the entire case (and more) to be re-opened by reference solely to the issue of status.

b) This will permit NAK to raise the signature issue even though this "*new*" point is not mentioned in the judgment. Indeed it would appear that any other point, whether "new" or not can be advanced.

c) In regard to the '*status*' issue, no finding was made as to its evidential significance nor, more importantly, as to the extent to which the material could with reasonable diligence have been available at the earlier hearing nor did it invite the lower court to consider such issues.

34. NAK submitted that, in any event, it was only in cases of "*flagrant*" breach of

Article 6 that it was open to this court to refuse to recognise the judgment. In that regard, reliance was placed on ***Government of USA v. Montgomery***. This concerned the registration of a Confiscation Order made in the US against an English resident but in his absence. At paragraph 24, Lord Carswell stated:

> "*The European Court has affirmed on a number of occasions the existence in principle of the possibility in a suitable case of invoking article 6. The context has generally been that of extradition or expulsion of aliens seeking admission to the country concerned, but in my opinion it is capable of being applied to the enforcement in a Convention state of a judgment obtained in another state, whether or not the latter is an adherent to the Convention. No decision was cited to your Lordships in which the court went so far as to hold that an act of extradition or expulsion amounted to a breach of article 6, and in all of the reported cases the European Court has strongly emphasised the exceptional nature of such a jurisdiction and the flagrant nature of the deprivation of an applicant's rights which would be required to trigger it.*"

35. There are two points to make here:

a) Even on the assumption that the denial of rights must be "*flagrant*" I would hold that the outcome in the Ukraine does indeed flow from a glaring shortfall from compliance with principle.

b) In any event, I accept the submission of MIC that the requirement for a flagrant breach only arises in the case of a decision in the courts of a non-Convention country: see Dicey & Morris: para. 14-149. ***Government of USA v. Montgomery*** paras. 27-29.

36. My overall conclusion that recognition should not be accorded to the judgment of the Supreme Commercial Court is fortified by two further considerations:

a) The original (and final) judgment has been in existence for five years. The proceedings to enforce it in England began over a year ago. It was only shortly after the failure to set aside service that any challenge to the original judgment was first mooted. Such a challenge should accordingly be approached with some caution if not scepticism.

b) The observations of the ECHR in both ***Pravednaya*** and ***Lizanets*** call for the requirements of Article 6 to be approached with particular sensitivity where, as here, the outcome of the proceedings favoured a state-owned entity.

## Conclusion

37. In the result I conclude that the application to set aside the default judgment and the associated freezing order must be dismissed. This renders it unnecessary to consider the alternative application for an interim freezing order in support of the Ukrainian proceedings.