Case No: 2010 Folio 1203

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

7 Rolls Buildings
Fetter Lane
London
England
EC4A 1NL

Date: Friday, 9 March 2012

BEFORE:

MR COLIN EDELMAN QC

BETWEEN:

STAR REEFERS POOL INC Claimant / Appellant

- and -

JFC GROUP CO LTD Defendant / Respondent

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(Official Shorthand Writers to the Court)

MR S RAINEY QC and MR T MACEY-DARE (instructed by Stevenson Harwood) appeared on behalf of the Claimant

MR S GEE and MR P STEVENSON (instructed by Swinnerton Moore LLP) appeared on behalf of the Defendant

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Judgment

THE JUDGE:

1. This is the return date of the claimant's application for a post-judgment worldwide freezing order which was granted by his Honour Judge Mackie QC on 16 December 2011 and varied by Nichol J *inter partes* on 22 December 2011.

2. The amount of the order is for some $21 million. It relates to an unsatisfied judgment against the defendant in the sum of over $16 million; the additional sums are by way of interest and costs.

3. The underlying claim relates to a claim on two guarantees, and I need not go into the detail of that because there is an unsatisfied judgment in England in relation to that.

4. There are, I should mention, concurrent proceedings in Russia, which, I am informed by the second affidavit of Mr Moore, has resulted in a judgment in favour of the defendant at this stage, that the guarantees are not enforceable. However, I am to deal with the worldwide freezing order that was made pursuant to the judgment that was entered in the court in England.

5. This is now the return date, and so the first question I have to ask myself is whether this order should be continued. Mr Gee QC has appeared on behalf of the defendant and has made no submissions in that regard. On behalf of his clients he does not oppose the continuation of the order, but for obvious and understandable reasons, he does not consent to it, which means that I have to satisfy myself that it is appropriate to continue the order, and, if so, on what terms.

6. On the first question as to whether I am satisfied that the order should be continued, I have regard to the matters set out in the very helpful skeleton argument submitted on behalf of the claimant. It has not been necessary for Mr Rainey QC, who appeared on behalf of the claimant, to develop orally what is said in the skeleton argument. I have carefully considered what has been said in the skeleton argument on the question of the continuation of the order and I have read the evidence which is said to support the continuation of the order, and it seems to me that firstly it is made out that there is a real risk of dissipation if the order is not continued, and secondly that it is just and convenient to do so.

7. I conclude that it is appropriate to continue with the order.

8. There is then the question of the terms of the order, and I have been provided with a draft order. There is a proposed alteration to paragraph 1 of the draft so that instead of reading, "… until further order of the court …" it should read:

   > "… until the satisfaction of the judgment and of all outstanding costs orders herein but with liberty to the defendant to apply to vary or discharge the order …" That alteration seems to me to be appropriate and accordingly I make the order under paragraph 1 subject to that alteration.

9. There are then further orders that are sought in the draft order in support of the freezing order. The defendant has taken issue with sub-paragraphs 2(g), 3(c) and 3(d) of the draft order. The claimant has elected not to pursue 3(c) and 3(d) so I need not concern myself with those. As for 2(g), what is now sought by way of disclosure of contractual documentation in relation to the purchase and resale of consignments shipped during December 2011 (instead of the various subparagraphs of 2(g) set out in the draft order) is that the documents to be disclosed should be: (i) contracts of purchase and resale, and (ii) commercial invoices under those contracts.

10. Mr Gee still opposes that order, suggesting that in the light of what is said in Mr Moore's second affidavit, it would be unduly onerous on the defendant in their current circumstances to have to provide this information. However, it seems to me that what is sought is limited to one month's transactions only (December 2011). It is sought in order to enable the claimant to understand the way in which the defendant carries on its business so that it can better seek to locate and identify the defendant's assets. Bearing in mind the limited scope of disclosure which is now sought under 2(g), and also what is said in an email of 5 March 2012 about Mr Copeland now having been appointed as a new Chief Executive Officer to address the affairs of the defendant, it seems to me that the order as sought by the claimant ought to be made.

11. I therefore rule in favour of the claimant on that aspect, subject to the modifications to 2(g) to which I have just referred.

12. This leads me on to the other heads of disclosure and information that are sought in the draft order,

which are not opposed by Mr Gee, but again are not consented to and therefore I need to satisfy myself that they are appropriate. Having considered the submissions made in support of those heads of further disclosure and information, and having read the evidence in support of those applications submitted by the claimant, it is, in my judgment, appropriate that those orders are made.

13. As to timing, it is agreed that the timings for compliance, other than for paragraph 2(a), should be by 23 March. As to 2(a), it seems to me to be appropriate that that should remain at 16 March. I take into account the submissions I have heard on that, but 16 March seems to me to be appropriate, having regard to the content of that sub-paragraph.

14. Accordingly, I continue the worldwide freezing order in those terms.

15. I also have to deal with an application by the defendant that there should be a qualification to the order in respect of the self-incrimination by the defendant in addressing the requirements of the order and it is suggested that I should either make an order the there should be no breach of the order if there is a claim to privilege against self-incrimination or alternatively, that I might provide in the order that if the defendant is properly advised that there are grounds to claim privilege then non-compliance will not be a breach. A further solution is suggested of the provision of potential documents to which a claim to privilege applies in a sealed envelope so that the court can then make a ruling.

16. On behalf of the claimant it is said that it is sufficient that the order should be qualified in a way that makes it clear that it does not affect the right of the defendant to claim privilege against self-incrimination.

17. In choosing between the proposed forms of order, I accept the claimant's submissions that it would be inappropriate for me to make provision in an order as to the criteria which must be satisfied in order for the privilege against self-incrimination not to result in a breach of the order. Accordingly it seems to me that the appropriate order to make so as to protect the position of the defendant whilst also leaving it to the court to ultimately to decide the question free of any fetters in the order is as follows:

> "Nothing in this order excludes the right of the defendant to claim privilege against self-incrimination. The validity of any claim to privilege against self-incrimination, and whether or not any non-compliance with this order in reliance upon that claim amounts to a breach of any provision of this order, shall be determined by the court."

18. I would add that when considering whether the claim to privilege amounts to a breach of the order, obviously if the claim is upheld then there could not be a breach of the order. If the claim was not upheld it would still be open, if necessary, for the court to consider whether the circumstances in which the claim came to be made were such as to cause it not to be regarded as a breach of the order for the purposes of committal or contempt. Many factors may be taken into account in that regard. That would include whether or not the person claiming privilege against self-incrimination had sought legal advice and had received legal advice on which the claim for privilege was based.

19. Mr Gee referred me to the case of IBM United Kingdom Ltd v Prima Data International Ltd [1994] 1 WLR 719 but the position on an Anton Pillar order seems to me to be distinguishable because the difficulty in that sort of case is as to the opportunity of the person who is the subject of the order obtaining legal advice and what that case explains is that safeguards need to be put in place in relation to such an order to ensure that the defendant does have the opportunity to take legal advice before anything is done to give effect to the order. In this case the time scale for compliance with these orders provides ample opportunity for the defendant to take legal advice.

20. There are two further issues arising out of the freezing order on which I now have to rule. The first is whether or not the claimant should have their costs of the hearing before Nichol J, as to which it said that the application for the extension of time was made on the Monday before the hearing and was not acceded to, with the result that the hearing was necessary.

21. However, it seems to me that there are two reasons why that should not result in the claimant being deprived of its costs. The first is that at that stage, there was no evidence provided to the claimant to support the application for an extension of time. That evidence only arrived at the very last minute. Secondly, in any event, in cases such as this, it is necessary for the parties to attend before the court to explore the ramifications of the extension of time requested and it is right to say that although the

extensions were granted, an additional provision was inserted in the order in the light of the evidence that was provided and so I regard that hearing as being part and parcel of the ordinary course of the procedure relating to a freezing order and therefore part and parcel of the costs of that order which the claimant has had to incur.

22. The claimant is entitled to a freezing order. Necessarily there may be applications to vary or discharge and it is only if the additional hearing had been caused by some unreasonable refusal on the claimant to consider an application to vary or discharge that I would consider that they ought to be deprived of their costs. So I order that the costs to which the claimant is entitled should include the costs of the original application, the application to vary the order and the application today.

23. The second issue is that I am asked to make a summary assessment of the costs. It is right that the commercial court guide indicates that usually summary assessment would be for bills below £100,000 but it does acknowledge that the court has the power to summarily assess costs when bills are in excess of that. The bill before me is for £236,514.92. The defendant says that they have not had proper opportunity to consider it. That obviously is an important factor to weigh in my mind but it does seem to me that I ought to proceed with a summary assessment but on the basis that a significant discount ought to be made to allow for the fact that the defendant is thereby being deprived of the opportunity to consider the bill and challenge items in it and the fact that the assessment process is not going to occur.

24. Doing the best I can, it seems to me that making an appropriate discount to allow for the defendant being deprived of the opportunity to look at this bill results in an order of £175,000.

25. I also have before me an application by the claimant to join named individuals who are said to be *de facto* or *de jure* directors of the defendant at the material times, that is at the time for the compliance with this order,. The application is to join them to the proceedings for contempt against the defendant and also to serve out of the jurisdiction on those named individuals because they are all outside the jurisdiction.

26. The first question I have to address is whether there is a good arguable case that they there have been breaches of the freezing which would amount to a contempt of court, because obviously if I could not be satisfied on that the application would fail at the first hurdle. In that regard I have considered the evidence which has been submitted to me and in particular the documentary evidence to which I have been referred. The focus of the claimant's case as to breach of the freezing order is on paragraph 13(e) of the order. That prohibits the defendant from dealing with or disposing of any of its assets other than in the ordinary or proper course of business and stipulates that before dealing with or disposing of any asset exceeding $25,000 in value the defendant must tell the claimant's solicitors. The allegation of breach is that assets exceeding $25,000 had been disposed of without any attempt to give prior notice to the claimant's solicitors.

27. The evidence includes an email from the defendant's solicitor to the claimant's solicitor dated 20 January 2012 identifying very substantial transactions and transfers of assets that occurred without prior notice to the claimant's solicitors and other documentary evidence, for example emails of 27 January and 5 March 2012, which is consistent with that course of conduct having occurred. Apart from the substantial sums of cash that appear to have been moved around and paid out, there is reference also to the sale of a hotel without prior notice to the claimant's solicitors. Having considered the evidence, it seems to me that there is a good arguable case that there have been breaches of paragraph 13(e) and that those breaches amount to a continuing disregard of the order.

28. The next question, assuming, as I have concluded, that there is a good arguable case that there have been breaches of the freezing order, is whether this an appropriate case for Order 45 proceedings[1]. In that regard, there is an email on 5 March 2012 from the defendant's solicitors saying that as a result of the appointment of Mr Kekhman, the new CEO with effect from today, considerable resource has been assigned to deal with the obligation to give advance notice of payments. A spreadsheet was provided showing payments until the end of February.

29. However, looking at the history it seems to me that there cannot be any confidence that the freezing order would be compiled with in accordance with its terms without Order 45 proceedings. Even if there is some prospect of an improvement in compliance there can be no confidence that there would be complete and satisfactory compliance with the order in the light of the sorry history that appears from the papers.

30. So I turn to the question of the named individuals who, it is said, are *de facto* or *de jure* directors. The first question is does the order apply to them at all. That raises a question of the true construction of paragraph 21(c) of the order which states that it applies to the defendant or his officer or agent appointed by power of attorney. The question is whether the words "by power of attorney" apply to the word "officer" as well. This point was rightly drawn to my attention and dealt with in submissions, as were a number of other issues, in accordance with Mr Rainey's discharge of his duty to make full and frank disclosure on an application that this is made ex-parte.

31. The proper construction of this part of the order would seem to me to be that the appointment by power of attorney must relate to an agent only. There is no obvious or sensible reason why the application of the order to officers of the defendant should be confined only to those officers with a power of attorney and it is quite apparent from the use of the words "officer or agent appointed by power of attorney" that what this is aimed at is those who control the company. Most naturally those are the officers of the company, but of course there may also be agents who control a company. It appears to me that the order is aimed at confining the agents to whom the order will apply to those appointed by power of attorney because a company may well have many agents of all characters who have varying degrees of authority to deal with aspects of the company's business, and it would create a state of great uncertainty as to which agents the order applied to if one did not confine it in some way. So the obvious way to confine it is to those who have some sort of right to control or dictate the affairs of the company and those would be agents with the power of attorney, whereas, as far as an officer is concerned, a person either is or is not an officer of the company. If the person is an officer, whether *de jure* or *de facto*, then that status carries with it (and if *de facto* only arises because there is) control over the company.

32. In my judgment this order did apply to these named individuals and in support of that there is the fact that they were specifically named in the penal notice and were the subject of specific and individual provisions as to service. There could have been no doubt, as far as they were concerned, that the order

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[1] RSC Order 45, rule 5(1) provides as follows:

Where -

> (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or as the case may be, within that time as extended or abridged under a court order or CPR rule 2.11; or
>
> (b) a person disobeys a judgment or order requiring him to abstain from doing an act,
>
> then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say –
>
> > (i) with the permission of the court, a writ of sequestration against the property of that person;
> >
> > (ii) where that person is a body corporate, with the permission of the court, a writ of sequestration against the property of any director or other officer of the body;
> >
> > (iii) subject to the provisions of the Debtors Act 1869 and 1878, an order of committal against that person or, where that person is a body corporate, against any such officer.

was being addressed to them personally and was being regarded as applying to them personally. So even if read in isolation 21(c) might have caused a person who was an officer of the defendant to wonder whether it applied to him or not, any such doubt would have been dispelled in relation to these individuals by the fact of their having been specifically named in the penal notice and made the subject of specific and individual service arrangements. There would have been no point in any of those steps being taken had it not been intended that the order should apply to them personally.

33. The next question is whether, in respect of each of them, there is a good arguable case that they are liable for contempt. The test in order for a director to be liabile for contempt is helpfully set out in the written skeleton argument on behalf of the claimant and that reads as follow:

> "In order to be liable for contempt for a company's breach of a court order under RSC order 45 or 51 the director or officer must be aware of the terms of the order and either (1) actively participate in the breach or (2) wilfully fail to take reasonable steps to discharge its duty to ensure that the order is obeyed."

34. Were the directors aware of the order? As to that there is the fact that they were served, according to the evidence before me, in accordance with the order and there have been responses in respect of the order, so it seems to me that hurdle is overcome.

35. Were they each *de jure* or *de facto* directors or officers of the company at times when compliance with the order was required? The status of the directors is as follows. Five of the seven named individuals have been *de jure* directors of the defendant continuously at all times since the making of the order. That is Yulia Zakharova, Andrey Afanasyev, Oleg Dobronravov, Tatiana Litvinova and Vitaly Podolsky. The other two named individuals, Vladimir Kekhman and Dmitri Kasatkin, were not *de jure* directors at the time but it is suggested that they were de facto or shadow directors.

36. As far as Mr Kekhman is concerned, the evidence indicates that he has a strong association with the defendant and associated companies as he is a current *de jure* director, has previously been a *de jure* director and there are good grounds for believing that he was still involved in between his periods as a *de jure* director because of his significant interest in and connection with the companies. I also bear in mind his apparent tag as the banana oligarch and the defendant is a company which deals in, amongst other things, bananas. As for Mr Kasatkin, he has, according to the evidence before me, links to a number of companies in the group of companies associated with the defendant and, on the evidence before me, there is sufficient evidence of his role in the defendant to give rise to a good arguable case that he exercises real authority in the corporate governance of the company. So I conclude that there is a good arguable case that both Mr Kekhman and Mr Kasatkin are *de facto* or shadow directors or officers of the defendant company.

37. I then move to the question of their responsibility for the breaches, if they have occurred but in respect of which I have found that, at the very least, there is a good arguable case that they did occur.

38. Mr Afanasyev had active responsibility, according to the evidence, for the compliance with this order and so there is a good arguable case that he would have been in breach of his duties.

39. As for the other individuals, it seems to me that the scale of the apparent non-compliance with the order, which amounted to a disregard of it, if the evidence is to be found to be true, gives rise to a good arguable case that, against each of the directors, there must at least have been a wilful failure on their part to take reasonable steps to discharge their duty to ensure the orders were obeyed.

40. On the claimant's evidence, which of course would have to be tested at a full hearing if this matter proceeds, there has been, as I have said, a disregard for the order such as to give rise to a good arguable case that all of those who have authority or control of the defendant company had, at the very least, wilfully failed to take reasonable steps to discharge their duty to ensure the orders were obeyed. I have dealt with their awareness of the order but just to reiterate again that I am satisfied, on the evidence, that in respect of each of those individuals there is sufficient evidence of their awareness of the order to give rise to a good arguable case of their wilful failure to take reasonable steps to discharge their duty in respect of it.

41. That then leaves the question of service out of the jurisdiction because each of these individuals is out of the jurisdiction and that involves firstly a question as to whether these proceedings can be properly

regarded as a claim. In that regard, the fact that these proceedings can, both under RSC (RSC 52.4.1) and CCR (CCR 29.1.4) be the subject of a claim form as well as an application notice seems to me to be a good indication that this procedure is regarded, for the purposes of the rules, as being in the nature of a claim.

42. This leads on to the issue of the application of the gateways for service out of the jurisdiction. The first gateway is whether or not these named individuals are "necessary or proper" parties to the proceedings in circumstances where a claim has been made against the defendant by virtue of the application notice that has been issued. The words "necessary or proper" are to be treated as alternatives. As to the meaning of "proper", I was referred to the notes in the White Book at paragraph 6.37.29 and in particular the first paragraph of that which says as follows:

> "Generally a person who may be joined in proceedings in accordance with the rules as to joinder of parties is a 'proper party' [and the case of Massey v Haynes is cited]."

43. It seems to me that applying that guidance, at the very least, the individuals are proper parties to be joined. Indeed they may be necessary as well but they are certainly proper parties to be joined because there is a good arguable case that they are the individuals responsible for the defendant having failed to comply with the order.

44. There is an alternative basis for jurisdiction which is that this is a claim "under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph". It seems to me that in light of the removal of the restrictions that there used to be on this gateway (previously, only specific enactments were identified), this must now be regarded as a general catch-all for claims under or pursuant to any statutory provision and Order 45 satisfies that requirement.

45. In those circumstances, it is unnecessary for me to consider whether this would also be a claim to enforce any judgment, as to which there are authorities which might indicate that that gateway would not apply.

46. Then there is the question whether the court has jurisdiction over these directors as directors who are out of the jurisdiction for their conduct out of the jurisdiction because obviously if the court has no jurisdiction to make an order against them, then it would not be appropriate in the exercise of my discretion to order service out of the jurisdiction. The authorities on this topic have been dealt with fully and fairly in Mr Rainey's skeleton argument and he also helpfully developed them orally. The question is whether this case falls within the category of cases addressed in *Masri v Consolidated Contractors International Company SAL & Ors* [2009] UKHL 43.

47. That case concerned CPR part 71, which applies to the attendance at court of officers of a judgment debtor to give evidence about the affairs and means of the judgment debtor or any other matter about which information is needed to enforce a judgment or order. That, of course, is a provision of wide scope in the sense that the officer need have no particular connection with the matters which have given rise to the judgment and need only be a person who might have knowledge of the affairs of the company. The officer's attendance is for the purposes of giving evidence. By contrast, under Order 45, what one is dealing with is a narrower range of persons – those involved in the control of the company whose responsibility it was to secure compliance with the order against the company and the purpose of Order 45 is the enforcement of a judgment or order.

48. In Masri, a distinction was drawn between CPR part 71 and section 133 of the Insolvency Act, which was the subject of attention in a case called in *In re Seagull Manufacturing* [1993] Ch 345, in which the Court of Appeal ordered service out of the jurisdiction. The distinction that was drawn was on the basis that that case involved a narrower category of persons. It seems to me that that distinction also applies here. Furthermore, as I have indicated, the purpose of Order 45 is very different from that of CPR Part 71. Taking into account the specific and defined category of persons to which Order 45 would apply and the purpose of Order 45, that the presumption of extra territoriality does not prevent the court from exercising jurisdiction over directors abroad who are directors of a company against which the court has entered judgment and made a freezing order, as in this case.

49. It would be quite remarkable if there was no jurisdiction to deal with officers of such a company on

the grounds that they were abroad because the consequence of this would be that whilst the court would have jurisdiction under Order 45 to deal with the company itself, that could be rendered nugatory if there was no right to pursue those who were responsible for the breach on the grounds that they were outside the jurisdiction. One can readily posit the possibility of a director or officer responsible for the breach of an order against his or her company, having significant assets within the jurisdiction but residing and committing breaches of the order outside the jurisdiction for the benefit of the company. It would be extraordinary if the director was to enjoy immunity from any sequestration of his/her assets simply because he or she resided abroad and committed breaches of the order abroad. So my conclusion is that Order 45 does apply to directors or officers responsible for a breach who are out of the jurisdiction.

50. In those circumstances, the question of whether this is a convenient forum for determining this issue answers itself. It must necessarily be the most convenient forum in circumstances where the judgment and the freezing order which it is alleged was breached were made in England are being enforced in England.