Case No. 2011 Folio No. 95

Neutral Citation Number: [2011] EWHC 337 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 18 February 2011

IN THE MATTER OF THE ARBITRATION ACT 1996
IN AN ARBITRATION CLAIM

Before:

MR JUSTICE BURTON

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BETWEEN:

NOMIHOLD SECURITES INC

Claimant/Applicant

and

MOBILE TELESYSTEMS FINANCE SA

Defendant/Respondent

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(Transcript of WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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MR S SALZEDO and **MR A POLLEY** (instructed by Simmons & Simmons) appeared on behalf of the Claimant/Applicant

MR V FLYNN QC and **MR T SMITH** (instructed by Latham & Watkins) appeared on behalf of the Defendant/Respondent

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Judgment

1. **MR JUSTICE BURTON:** This has been the hearing of a number of applications by the Claimant and the Defendant in relation to the outcome of an arbitration in which an award was made in favour of the Claimant in the sum of $208 million, arising out of an Option Agreement with regard to shares in a company called Tarino in which, prior to that Option Agreement, the Defendants had had a 51% interest and the Claimant a 49% interest, the latter being the subject of the Option Agreement.

2. There has been no satisfaction of that award, which was made in December 2010 and the time for challenge to the award, under sections 67, 68 or 69 of the Arbitration Act, applicable to the award because it was in the London Court of Arbitration, has expired.

3. The Claimant obtained ex parte from Gloster J worldwide freezing order relief and various orders for disclosure against the Defendant.

4. The basis for the fear of dissipation, the hurdle being inevitably lower in relation to what could be called a post judgment freezing order, characterising the award as if it were a judgment for this purpose, than a pre-trial freezing order, was nevertheless a heavy burden for the Claimant to establish and Gloster J was satisfied, after an ex parte hearing, that they did so establish it.

5. At the same time as granting that ex parte relief, she made an ex parte order under section 66 of the Arbitration Act whereby the award could be enforced in this country as a judgment.

6. There are no known actual assets of the Defendant company within the jurisdiction, but the basis of the Claimant's claim that there was a sufficient interest in this jurisdiction to grant an order under section 66 enforcing the award was by reference to **Fonu v Demirel**, [2007] 1 WLR 2508 and the circumstances to which I shall refer.

7. The basis of the fear of dissipation or, to be precise, fear that the judgment or award, once recognised as a judgment, would not be satisfied, were threefold. First that it was apparent to the Claimant that, for no reason that had been expressed and notwithstanding the expiry of the time for challenge to the award, there was a clear intention on the part of the Defendant not to satisfy the award. This was clear not only from the failure to respond to correspondence and the failure to challenge the award but without making payment but centrally from the public pursuance by way of Tender of a proposed transaction, this was dedicated towards dealing with and rearranging a series of notes which had been issued to the public as long as five years ago, but which contained a provision that in the event of default by the Defendant – being the subsidiary of a company which I shall call MTS to distinguish it from the Defendant (which I shall call MTF where appropriate) - then the whole transaction would be unravelled and the notes became repayable, and the obligations under various cross default provisions might have been substantial.

8. It was apparent from the very literature published in support of the proposed rearrangement of those notes that the reason for the proposals to which I shall refer was the fact that the period of time for payment of the award expired on 5 March, which would trigger or would probably trigger the event of default. There was no hiding of

that. Indeed, that was put forward as the reason for a document called a Consent Solicitation, which was seeking, with the involvement of the Defendant company, the agreement of all the various parties to delete from the notes the provision for an event of default by reference to the non-satisfaction of a judgment or award. In those circumstances, it is clear that the Defendant had no intention of paying the money due prior to 5 March and, indeed, would take steps to ensure that the default which would otherwise be triggered by such non-payment would be avoided.

9. The second ground for concern was the rest of the transaction of which this formed part because, at the same time, the published documentation included not only the Consent Solicitation provision but also the provision for rearrangement of the notes whereby they would be either repurchased or, at any rate, the role of the Defendant subsidiary from the transactions would be removed.

10. The Claimant's assertion before Gloster J was that this would remove an asset of the Defendant, indeed, on the basis of its accounts, subject to what hereafter I shall mention, its only asset, and that this was not fanciful is evidenced by a passage in the literature itself, at page 8 of one of the documents, which read as follows:

> "Upon the consummation of the offer, [MTF] will hold minimal assets with which it could satisfy the award."

11. That clearly implies that it was the satisfaction or execution of the new offer which was going to remove any material assets from the ownership of MTF. That asset, plainly, could only be a reference to the debt owed to MTF by its parent as a result of the monies laid out by the parent to the noteholders.

12. On the face of the subsidiary's accounts, the two sums, originally USD 800 million and now USD 400 million, cancel themselves out, assets USD 400 million and liabilities USD 400 million, the asset being the debt owed to MTF by its parent, the liability being the debt owed MTF to the noteholders.

13. The impression therefore which is left is that the purpose, and if not the purpose then the effect, of the transaction in question would be to strip the subsidiary, MTF, of its only relevant asset. Hence the need to move for injunctive relief. Neither of those two matters would have justified, on their own, an application to be ex parte to Gloster J in my view, but what did justify it and what made the further ground for the grant of relief which was sought and made was the existence or apparent disappearance of an indemnity said to be given to MTF, the Defendant, by the shareholders of the ultimate parent company Sistema.

14. This was an indemnity to the amount of USD 170 million expressly in respect of any liability of the Defendant company to the Claimant in the arbitration, which was eventually unsuccessful. That was trumpeted in the accounts of the parent company, in the accounts of Sistema and, for obvious reasons, because it would be so relevant to its solvency, in the accounts of the Defendant.

15. It disappeared from the accounts of Sistema and of the parent company in 2009, having been present in 2007 and 2008. It did not disappear, however, from the accounts of the subsidiary, the Defendant, and it may well be that it would be thought by the public that the assurance given in the auditors' note that the otherwise apparent balance sheet insolvency of the company, which was only justified or ameliorated by the existence of outside support, was in substantial part based upon the existence of this indemnity, still trumpeted in the notes to the 2009 accounts.

16. There was plainly a concern, it having disappeared from the other accounts, as to what had happened to it. I am entirely satisfied that it was proper and appropriate to have sought ex parte, and for Gloster J to have granted, a post judgment/award/ recognition application freezing order in those circumstances and to have done so in respect of the Defendant which had (a) an apparent asset of USD 400 million about to disappear and (b) an apparent asset of an indemnity from Sistema of 170 million which appeared to have already disappeared, and yet whose existence still seemed at least hinted at.

17. It is suggested that there was a number of matters of non-disclosure in the application before Gloster J. I can deal with those quite shortly, because, at any rate for the purposes of obtaining the relief that Mr Flynn QC was primarily interested in, he did not take too much time to pursue any of them today, although of course they were set out in detail in his skeleton argument.

18. First, it was said that there was non-disclosure of the proper effect of the award. This, it seems, will be the subject of some discussion in the section 66 set-aside application which Mr Flynn has also issued. What Mr Flynn submits is that, in reality, what the arbitrators awarded was specific performance of the Option Agreement, and, consequently, that it was not a simple money judgment, and that that should have been disclosed to Gloster J. Mr Salzedo firmly resists the argument and submits, indeed, that it is so hopeless that it could never have been foreseen as a possible defence, and therefore did not fall within the rubric whereby an applicant for an ex parte injunction needs to disclose defences which are thought likely to be available to the Defendant. He points out the format of the award which is plainly, on its face, a money judgment. As he told Gloster J, on his case such remains the case, his clients having done all that was necessary to transfer the shares in Tarino which were inevitably to be transferred in return for the monies due under the Option Agreement.

19. Secondly, it is said by Mr Flynn that there was an inadequate disclosure to Gloster J of the precise nature of the Tender Offer. That simply arises out of a different view of the Tender Offer from that which was held by the Claimant and, in any event, it is significant, as I will describe, that the Tender Offer, which was then before the court, which was coupled with the Consent Solicitation to I have referred, has now been withdrawn, and is now proposed in a separate form, unaccompanied by the Consent Solicitation, as I shall describe.

20. Thirdly, it was suggested that there was a failure to draw to the attention of Gloster J that there was no undertaking number 10 in the standard form of freezing orders before the court on such an application in draft, namely a provision for not bringing an application of a similar kind in another jurisdiction without leave of the court.

21. Mr Salzedo agrees that he should have drawn to the attention of Gloster J the removal from the standard draft of paragraph 10, but submits that it is of no materiality, because he would have satisfied Gloster J that, by reference to **Derby v Weldon No. 1**, there was no need for such an order. And the fact that he was, at that time, on instructions, or his clients were, considering the bringing of proceedings in Luxembourg, would not have needed to have been disclosed, if there was no need for such a paragraph in the order.

22. Fourthly, there was no provision for a cross- undertaking in damages. This is said to have been a non-disclosure or a misdescription by Mr Salzedo by Mr Flynn, because Mr Flynn has referred to a passage in Gee which said that it was the practice to give a cross-undertaking in damages to a Defendant in a post judgment injunction application, whereas Mr Salzedo submitted to Gloster J that it is normal practice not to do so.

23. It is quite plain that, in fact, on analysis of Mr Gee's book that in a different part of his book he says something to the contrary. I am sure that is a one-off as far as Mr Gee is concerned, but I don't think that his book can be, in those circumstances, relied upon as establishing a non-disclosure, where in the White Book the exact statement was made supporting what Mr Salzedo has said, namely that it is not usual practice to supply a cross-undertaking in damages in a post judgment freezing order.

24. I happen to believe that it is always appropriate to give a cross-undertaking in damages but that it would be most unusual to have to fortify such cross- undertaking, however poor or unwell-heeled the Claimant is, where it is owed a substantial sum of money under the judgment because there may be circumstances in which, albeit that a judgment debt is owed and is unpaid, the effects of a freezing order, particularly a worldwide freezing order, may be overly damaging and overly prejudicial and that even if, at the end of the day, the judgment is paid up, there may fall to be set off some damage which is shown to have flowed as a result of the inappropriate obtaining of the freezing order.

25. So therefore I conclude that there was no non-disclosure but that it would have been appropriate for the cross-undertaking in damages unfortified to have been offered. I should indicate that a cross-undertaking in respect of the damages of third parties was offered and fortified to be in the sum of USD 250,000. A case is made by Mr Flynn that there was no disclosure to Gloster J of the financial position of the Claimant company and that is right, but she was offered, and was satisfied with, fortification in a substantial sum of $250,000 in respect of the position of third parties. And I do not conclude that there was any material non-disclosure in those circumstances.

26. Finally it is said there was undisclosed prejudice to third parties, which I suppose ties in with the suggestion that $250,000 was insufficient. In my judgment, that, again, is a question of impression for the Claimant -- the Defendant would have preferred the Claimant to have put the case in a more dramatic way in terms of the potential catastrophic damage to third parties - but given that there was a return date for this injunction at a very few days thereafter, prejudice to third parties over and above $250,000, if appropriate, would fall in due course to be considered and, indeed, has been considered in the course of this application before me.

27. I have already indicated that I conclude that it was an appropriate application to make without notice.

28. In those circumstances, I am satisfied that there was ground to grant this worldwide freezing order, and that it was appropriate at the time, and was not vitiated by non-disclosure. I conclude that there should have been and should now be a cross-undertaking in damages, but unfortified.

29. I now turn to the question as to whether it should continue. There are three aspects to this application. The first is whether it should continue at all; the second is whether there should be exempted from it any prohibition of the newly severed Consent Solicitation; and, third, whether there should be any inhibition upon a Tender Offer, of the kind originally put forward and now withdrawn, which would involve rearrangement, as I indicated earlier, by way of replacement of the parent company into the notes and/or payment off by the parent company of the present noteholders so as to exclude the Defendant subsidiary from any part in the continuing arrangements.

30. I deal, first, with the 'event of default' aspect. When the event of default was part and parcel of the proposed Tender Offer, as it was when it was before Gloster J, it meant that in respect of the whole transaction steps needed to be taken by the Defendant before it could proceed, not least the participation in the consent to exclude the event of default provision from the existing notes.

31. It now stands alone and it is the only part of the original package with which the Defendant's parent, who has not taken the trouble to appear before me, but has left its subsidiary, the Defendant, to do the argument through Mr Flynn, wishes to go ahead.

32. So far as that is concerned, the argument is very finely balanced and is, in my judgment, unusual. Mr Salzedo submits that this is the only way in which he can get his judgment paid. If the event of default clause is left in the notes then, on 5 March, the whole arrangement will come crashing down, and there will be all kinds of cross-default provisions involving potential loss to the parent company, it seems of a substantial kind. So that is the only way in which he can be sure of his clients getting paid, because otherwise it is apparent that the Defendant and its parent, who are the source of every payment, will take every possible step to avoid making payment. That has become now apparent, by virtue not least of the application under section 66 to challenge registration in this country.

33. Mr Flynn, however, submits that that is not what a worldwide freezing order is, even post judgment, intended for and in effect amounts to seeking a guarantee from the parent which the Claimant does not have. He submits that Mr Salzedo is reading far too widely the words of Lawrence Collins LJ in **Masri v Consolidated Contractors International UK Limited No. 2** [2009] QB 487 where he said:

> "It is sufficient for the grant of relief that there is a real risk that the judgment will remain unsatisfied if injunctive relief is refused."

34. He refers to **Ketchum International Plc v Group Public Relations Holdings Limited** [1997] 1 WLR at page 4.

35. That case is put before me by Mr Flynn. It includes a judgment of Stuart-Smith LJ in which he said at 10F:

> "In my judgment, this jurisdiction is not limited ... to cases concerned with the preservation of a fund or property the subject of the action but is based on the wider principle ... that justice requires that the court shall be able to take steps to ensure that its judgments are not rendered valueless by an unjustifiable disposal of assets."

36. That is the passage which it seems Lawrence Collins LJ based his view on, but it does not justify the broad way in which Lawrence Collins LJ put it. Both those two decisions are judgments of the Court of Appeal. Lawrence Collins LJ is a very experienced academic, apart from now being in the Supreme Court, in the private international field.

37. As Mr Salzedo submits, there is no reason why, just as the Mareva itself was a first, the jurisdiction should not be pushed further out.

38. He is entitled to his award, he submits, and the only way he can get it will be by making life so difficult for the Defendant that its parent company will be caused to pay up. That, of course, would extend to any kind of action or injunction or order by a judgment creditor in relation to any kind of transactions which its recalcitrant judgment debtor was proposing to enter into, whereby some order could be obtained which would be intended to mean that the Defendant would be forced by commercial embarrassment or commercial difficulties so caused into paying up, or as Mr Salzedo says, at least providing security.

39. It seems to me that the provision of security is irrelevant in most cases because, of course, there being a judgment debt that would amount, in fact, to the paying of that judgment debt. In this case Mr Salzedo said he is not expecting the Defendant to pay up, because he knows that the Defendant does not have any money. So it would inevitably be the provision of the security by the parent company. And that could be held until after the resolution of the section 66 application, which is to be adjourned, pursuant to which he is confident that registration of the judgment in this country by way of enforcement will survive and he can then enforce against that guarantee.

40. I conclude that that is not where post-judgment freezing orders have got to. They do not legitimise interference in ordinary commercial transactions simply because a judgment debtor is not paying up quickly enough. There has, in my judgment, to be some element of impropriety. In this case, I do not see any impropriety. It was a public declaration that there would be a default and that steps had to be taken, not least in the interest of a number of third parties, if that was not going to have catastrophic consequence. I do not conclude, even if one were to extend the ambit of Stuart-Smith LJ's enunciation of the jurisdiction, that it would go so far as to say that a judgment creditor can interfere in any transaction which would render it more likely that he

would be paid a judgment which otherwise the judgment debtor is determined not to pay, particularly where the pressure is thus put on a third party, in this case the parent.

41. Accordingly, I conclude that it is not appropriate to cover the Consent Solicitation by the freezing order but to proceed with that transaction ought not to be a breach of the continuing freezing order.

42. As for the Tender Offer from which the Consent Solicitation is being decoupled, Mr Flynn submits that it is inappropriate on two grounds for that Tender Offer to be enjoined or anything similar to it. He asks for a declaration, which would be an interim declaration, which I have jurisdiction to make, not in order to create any substantial point as between Claimant and Defendant, but because only in that way can third party financial institutions be reassured that there would be no breach of the existing order against the Defendant if the transaction or something similar were entered into.

43. There are two points. The first is that notwithstanding the way that the literature described the effect of the transaction on the remaining minimal assets of the Defendant, to which I have referred, and the words in his witness statement of Mr Clifford, when he referred to the effect of the cancellation of the loan notes by way of a corresponding reduction in the loan amount owing by the parent to the Claimant under the back-to-back loan agreement, he submits that, in fact, there is no asset in the hands of the subsidiary which could be in any way diminished by the proposed transaction.

44. It is accepted by Mr Salzedo that if there were an insolvency, whether here or in Luxembourg where the subsidiary is based, that would be the case, because it would bring the note arrangements crashing down and there would then be a set off. But, submits Mr Salzedo, if the transactions remain in place then he does not accept that there is not, on the face of it, an asset available to the Defendant, namely a debt owed to it by the parent, and the parent would, only by dint of taking steps to buy in the notes, be able to reduce that debt which it could not do all at once.

45. It seems to me that Mr Salzedo's point on this is arguable. But where I conclude that he cannot, in the event, stand in the way of the transaction is because it does not amount to any step taken by the Defendant. What is proposed is that, at any rate now that the Consent Solicitation is being severed, steps are to be taken which do not involve anything other than a reduction of the debt or potential debt of the Defendant by independent steps taken by the parent. The result will be to eliminate simultaneously both purported asset and purported liability, but as a result of steps taken in which the Defendant will play no part.

46. In my judgment, therefore, I can and should declare for the avoidance of doubt so far as third parties are concerned that any steps taken by the parent to buy in the loans or to Tender in accordance with something similar to the present terms would, provided there were no step taken by the Defendant which I am satisfied at the moment are not intended, none of that would be in breach of the Defendant's obligations to comply with the freezing order.

47. I should say that in relation to both the Consent Solicitation and the Tender Offer or something similar, which would thereby be allowed notwithstanding the continuation of the freezing order, there should be no question whatever of any expenditure or liability by the Defendant on any fees. I think, most unwisely, it was stated in the literature that the fees would be the liability, or might be the liability, of the Defendant, notwithstanding that they would be paid in the first instance by the parent. That, plainly, would amount, if pursued, to a breach of the injunction. And so there must be no doubt at all, both in fact and in presentation, that no fees are either to be paid or payable by or in any way the obligation of the subsidiary Defendant.

48. However, whereas I conclude that both the two urgent or relatively urgent transactions which it is sought to clear as a result of this application can proceed, the freezing order should continue, because I conclude that there is, quite plainly, a determination to avoid liability. The way that it is being done at the moment does not involve a breach of the injunction, but I suspect that any other way that could be found would also be taken. And, in particular, I am extremely concerned about the disappearing or vanishing indemnity. I have formulated suggestions which I think counsel will put forward in an agreed order which will require that a proper explanation be given as to the absence of an indemnity which is now said to have been entered into by a Cypriot company in 2007, and expired in May 2009, when (a) public documentation indicated that it was in existence in 2006: (b) such same public documentation and the accounts pictured it as being an indemnity given by shareholders at Sistema - it may be that the Cypriot company constitutes that entity, but no explanation is given: and (c) most importantly, it seems extraordinary to me that an indemnity which was intended to give public relief to the Defendant company in respect of its liability in the arbitration should have expired, and not been renewed, more than six months before the real hearings in the arbitration, albeit there had been a good deal of skirmishing prior to that.

49. I am satisfied that the injunction should continue in the first instance until the hearing of the section 66 application, which I adjourn. It seems to me that there may well be nothing whatsoever in the challenge to the section 66 application. I have been addressed on it by Mr Salzedo, but not in reply by Mr Flynn, because I did not today call on him. What is said by Mr Flynn is vigorously rebutted by Mr Salzedo: (a) he submits that there is no difficulty whatever in his complying with the arbitration award - insofar as it was necessary to do so by supplying the share transfers, that has been done and if there has been any problem caused it is entirely on the part of the Defendant and its group; (b) that any now alleged false evidence by one of the Claimant's witnesses in the arbitration is, if at all true, immaterial for the reasons given in the arbitration award; that the transaction was, again, as found by the arbitrators, affirmed in any event; and that it is far too late to bring in such evidence which would have been reasonably available at the time of the arbitration.

50. There may be other matters which could be raised on a section 66 application but, particularly given that evidence has only very recently been served by the Defendant and the Claimant may well want to produce some evidence as to what has happened in the Seychelles, in relation to the share transfer, I conclude that there is just about enough for the challenge to go forward and, in any event, a section 66 application is one of discretion, and should be considered by the court on the next occasion. I am not

proposing to order, as I was asked to do, that there be any kind of security provided by the Defendant, no doubt through its parent company, but there will remain in place, pending the section 66 application, in any event, for the reasons I have given, the freezing order, which will at least give some protection to the Claimant pending the confirmation of the recognition it all adds to an enforceable judgment in this country.

51. I conclude that, although it is right to say that **Dadourian** has introduced a worldwide freezing order policing system, I do not read it as meaning that in every case there should be such an undertaking. I conclude that where, as here, there has been an award which is prima facie enforceable in any number of jurisdictions, there is not any need for the English court to act as policeman. In those circumstances, I do not include that undertaking.

52. There is no other outstanding matter, other than the disclosure order which I indicated should be given in relation to the indemnity. As I understand it, I have not heard both sides' argument on costs, but Mr Flynn has suggested that I do not make any final decision as to costs today and I shall ask both parties what they wish to say about it.