5 June 2019

PJSC TATNEFT v BOGOLYUBOV & OTHERS

[2019] EWHC 1400 (Comm)

BEFORE: MR JUSTICE BUTCHER

CASE SUMMARY

The judgment sheds light on three main points of principle and practice regarding applications for security for costs. First, at the interlocutory stage, the court is unlikely to be able to resolve conflicting expert evidence as to the risk of non-enforcement. Indeed, the fact that experts disagree about the existence of such a risk may itself lead the court to conclude that the risk was not fanciful. Second, if the claimant points to assets within the Convention-zone in order to resist an order for security, apart from asking whether there are substantial obstacles to enforcement at the claimant's residence, the court will also need to consider the risk of non-enforcement against the assets within the zone. If those assets are capable of being dissipated, that would be a factor in favour of ordering security. Absence of evidence of the claimant's lack of probity is not, in itself, sufficient to negate the possibility that these assets may not be available by the time enforcement is sought. Third, the fact that the claimant is a reputable, solvent organisation and that it intends (presently) to satisfy the costs order does not mean that an order for security is unnecessary. There may be many reasons why a party which, although reputable, and fully intending during the proceedings to pay an order for costs, subsequently decides that it will or should not do so.

Background

The claimant ("Tatneft") is an oil company incorporated in Tatarstan, one of the constituent members of the Russian Federation. The Defendants are Ukrainian businessmen.

The dispute between them arose from the Defendants' alleged involvement in what Tatneft described as an "Oil Payment Siphoning Scheme". In 2007, Tatneft had sold oil to a company called PJSC Transnational Financial and Industrial Company 'Ukrtatnafta' ("UTN"). In October 2007, Tatneft ceased to deliver oil and UTN stopped making payments. Tatneft alleged that the Defendants had siphoned off the outstanding value of UTN's payments. Tatneft sought to hold the Defendants liable for damages of US$334 million under Russian law.

In the context of this claim, the Defendants' application for security for costs came up before Butcher J in May 2019.

The Principles

The starting point for Butcher J's analysis was CPR 25.13 which sets out the two pre-conditions that applications for security for costs must meet: (a) the claimant must be resident out of the jurisdiction (and not resident in a state bound by the Brussels Regulation, the Lugano Convention or the 2005 Hague Convention); and (b) having regard to all the circumstances of the case, the court must be satisfied that it is just to make an order for security for costs.

Butcher J then articulated four principles regarding the courts' general approach to applications for security for costs:

(a) The justification for the Court's discretion under CPR 25.13 is that there may be substantial obstacles to, or a substantial extra burden involved in, enforcing judgment against

individuals and companies resident in non-convention states. The discretion must be exercised in a non-discriminatory manner: *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868 at [62].

(b) A security for costs applicant is not required to show that it is more likely than not that there would be substantial obstacles to enforcement. It suffices if it is established that there is a "*real risk*" that the applicant will not be in a position to enforce an order for costs against the respondent: *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099 at [77].

(c) For these purposes, a "*real*" risk means a risk that is "*not-fanciful*": *In re RBS Rights Issue Litigation* [2017] 1 WLR 4635 at [29].

(d) The Court will not adopt a 'sliding scale' to assess the degree of risk of non-enforcement involved and discount the costs figure correspondingly. Once it is established that there exists a 'real risk' of non-enforcement, at least as a starting point, the defendant is entitled to security for the entirety of its costs: *Danilina v Chernukhin* [2018] EWCA Civ 1802 at [57].

Based on these principles, two main issues arose for determination: first, is there a real risk of substantial obstacles to the enforcement of a costs order against Tatneft? Second, if there is, is it just to make an order for security for costs?

Real Risk of Non-Enforcement

As Butcher J noted (at [14]), there were two aspects to the question whether there was a real risk of non-enforcement against Tatneft. Although Tatneft was resident in Russia, it owned certain assets located in Switzerland and Cyprus. Tatneft argued that even if there were obstacles to enforcement in Russia there would be no difficulty in enforcing a costs order against its Swiss and Cypriot assets. On this basis, Tatneft contended that there was no basis for making an order for security for costs against it. Butcher J considered each aspect of Tatneft's case in turn.

Risk of Non-Enforcement in Russia

One of the difficulties in the way of assessing whether there was a real risk of non-enforcement against Tatneft in Russia arose from the conflicting views expressed by the experts on Russian law. Regarding the difficulties in evaluating conflicting expert evidence at the interlocutory stage, Butcher J observed that "*save in clear cases in which it can be plainly seen that one or the other expert lacks qualifications or reliability, or that there is no room for serious argument, it is unlikely to be possible to prefer one expert's view on a disputed point to the other's*" (at [19](3)). If the court is unable to decide between the evidence of the experts, he said, that may itself lead the court to conclude that there is a risk of non-enforcement because there is the possibility that the views of the expert who says that there is such a risk are correct (at [19](4)).

On this occasion, Butcher J found that there was a real risk of there being substantial obstacles to enforcement of a costs order in favour of the Defendants in Russia for seven reasons:

First, he referred to a statistical analysis conducted by the Defendants' solicitors, by reference to the publicly available information, of the enforcement foreign judgments and arbitral awards by Russian courts. The statistics showed that the proportion of decisions involving Ukrainian applicants or from Ukrainian courts which had been enforced in Russia has decreased from 60% in 2015 to 18% in 2018. Similarly, the enforcement of judgments of English courts or arbitral tribunals in Russia also showed a decline. Butcher J stated that though evidence such as this, by itself, did not establish a real risk of non-enforcement, it did "*support the conclusion that there is a real risk of non-enforcement*" (at [23]).

Second, it was common ground that there was no bilateral treaty between the United Kingdom and Russia requiring the courts of each jurisdiction to recognise or enforce judgments or costs orders made by the courts of the other. This, in itself, gave rise to an element of uncertainty and risk (at [24]).

Third, the usual basis upon which one would seek enforcement of English judgments in Russia is reciprocity i.e., on the ground that English courts recognise and enforce Russian judgments. The Defendants' expert supported the view that reciprocity had to be established on a case-by-case basis. In contrast, according to Tatneft's expert, there was a presumption of reciprocity. Butcher J concluded there was uncertainty as to the existence and ambit of any such presumption. Accordingly, "*there was a risk, which again could not be described as fanciful, that reciprocity might not be found to be established in the event of an attempt to enforce a costs award in the present case*" (at [26]).

Fourth, by Information Letter No 78, the Praesidium of the Supreme Arbitrazh Court of the Russian Federation had stated that rulings of foreign courts on application of "interim measures" are not to be recognised and enforced in Russia because they are not final acts on the substance of the dispute. There was a debate between the parties as to whether a costs-only order would be caught by this rule. Here, again, Butcher J was of the view that there was a more than fanciful risk of non-enforcement of a judgment for costs if it was unaccompanied by any determination of the merits of the dispute (at [30]).

Fifth, Russian courts are entitled to refuse enforcement of a foreign decision if it conflicts with Russian public order. The evidence of the Defendants' expert was that Russian courts interpret the concept of public order expansively and that it was difficult to predict when enforcement would be refused on this basis. Butcher J was persuaded that there was a non-fanciful risk that a Russian enforcement court would apply the public policy exception in such a way as to refuse enforcement in this case (at [31]). This concern was exacerbated by the political differences between the parties.

Sixth, on 22 October 2018 Russia had imposed "*special economic measures*" in respect of certain Ukrainian companies and individuals. The sanctions imposed consisted of "*blocking of moneys, securities and property in the territory of the Russian Federation, as well as a prohibition for transfers out of the territory of the Russian Federation*". The first and the third Defendants were named in the sanctions list. Butcher J held that the existence of these sanctions established a real risk that enforcement in favour of these Defendants would be denied by Russian courts by reference to public policy (at [35]).

Seventh, taking all the points together, it was clear that there was a real risk of substantial obstacles to enforcement in Russia.

Tatfneft's assets in Switzerland and Cyprus

As highlighted above, Tatneft also relied on the alternative contention that its assets in Switzerland and Cyprus obviated the need for an order for security for costs. Tatneft's Swiss assets were 99% of the shares in Tatneft Oil AG ("TOAG"), a Swiss company, and its Cypriot assets were 100% of the shares in a Cypriot company called Tatneft Finance (Cyprus) Limited ("Tatneft Finance").

The Defendants argued that these assets did not provide any real assurance that, when they sought to enforce a costs order against them, there would be anything of substantial value to enforce against. In particular, the Defendants expressed concern that Tatneft may deal with these assets in such a way as to prevent enforcement.

Tatneft made two points in response. First, it pointed out that there was no evidence of lack of probity on its part. Therefore, it was said, there was no reason for the court to proceed on the basis that it would deal with its Swiss and Cypriot assets so as to prevent enforcement (at [44]). Second, and

alternatively, Tatneft expressed willingness to offer certain undertakings to the court in relation to its Swiss and Cypriot assets.

Butcher J was not persuaded by either of these points. He noted that the central question regarding enforcement against Tatneft's Swiss and Cypriot assets was the same one that he had considered at the first stage: whether there was a real risk that there would be substantial obstacles to enforcement against these assets (at [47]). He was satisfied that there was a real risk that the Swiss and Cypriot assets would not be available if and when the issue of enforcement of a costs order arose.

As to the absence of evidence of a lack of probity on Tatneft's part, Butcher J was not persuaded that if a non-Convention resident has assets within the zone then, in the absence of a showing of probity, security will not be ordered (at [49]). By reference to the decision of the Commercial Court in *Texuna International Ltd v Cairn Energy plc* [2004] EWHC 1102 (Comm), he pointed out that the risk of non-enforcement was "*not limited to… steps taken by a claimant which lacks probity to move assets out of a jurisdiction where enforcement will not be subject to substantial obstacles, though obviously a lack of probity would be highly relevant*" (at [49]).

As to the undertakings offered by Tatneft, Butcher J observed that they would have the effect of avoiding the need to order security for costs only if they were capable of "*clearly and satisfactorily*" eliminating the risk of non-enforcement (at [51]). He was not satisfied that the undertakings offered by Tatneft were sufficiently robust (at [52]).

Is it just to make an order for security for costs?

Having decided that there was a real risk of there being substantial obstacles to the enforcement of a costs order against Tatneft, Butcher J turned to consider the court's residual discretion; was it was just to make an order for security in all the circumstances? The fact that the Defendants were able to satisfy the first stage did not of itself mean that it would be just to order security. Nevertheless, Butcher J held that it was a strong consideration in favour of doing so (at [54]).

In support of its contention that security for costs should not be ordered, Tatneft had pointed out that it was a reputable and solvent organisation with no record of defaulting on its obligations. Further, it was said that it did intend to satisfy any costs order that was made against it. Indeed, it was said that not doing so would cause severe damage to its commercial reputation.

Butcher J was not persuaded that this was a sufficient basis upon which to conclude that an order for security was unnecessary. As he put it, "*[w]hen it is ordered, security for costs is required in order to deal with the situation where an order for costs has not been complied with*" (at [56]). He pointed out that there may be many reasons why a party which, although reputable, and fully intending during the proceedings to pay an order for costs, subsequently decides that it will or should not do so.

Overall, in circumstances where the Defendants were able to show a real risk of substantial obstacles to enforcement against Tatneft, Tatneft was able to put up security and had not pointed to any other prejudice that it would suffer if ordered to do so, and since the Defendants would be prejudiced if security was not put up, Butcher J considered that it was just for Tatneft to be ordered to put up security for the entirety of the Defendants' costs.

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: https://www.bailii.org/ew/cases/EWHC/Comm/