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

Before Mr Justice Calver

22 September 2021

Surkis & ors v Poroshenko & anor
[2021] EWHC 2512 (Comm)

CASE SUMMARY

Calver J granted reverse summary judgment on claims against the former president and central bank governor of Ukraine and struck out the claimants' Amended Particulars of Claim. His Lordship found that the claims were barred by state immunity which had not been waived by Ukraine. All claims except the lawful means conspiracy claim were also barred by the foreign act of state doctrine, and none of the claims had a real prospect of success.

Background

The claimants were Igor Surkis, a Ukrainian businessman, and English companies beneficially owned by his family. They had held bank accounts with Commercial Bank PrivatBank ("**PrivatBank**") at its branch in Cyprus. PrivatBank was declared insolvent and nationalised in December 2016.

The nationalisation of PrivatBank was implemented by the Deposit Guarantee Fund (the "**DGF**"), a special public body in charge of the resolution of insolvent banks which was authorised by a Ukrainian statute to act on PrivatBank's behalf in place of its shareholders and management. The nationalisation included a bail-in of related party liabilities in addition to the injection of state funds (the "**Bail-In**"). Under the terms of the Bail-In, the DGF was authorised to exchange funds held in accounts of the bank's "related parties" (more precisely the account holders' claim rights against the bank) for shares in the bank's capital, which were then sold to the state for a nominal sum.

The National Bank of Ukraine (the "**NBU**") was empowered by Ukrainian statute to designate the "related parties" of banks. Before the nationalisation of PrivatBank, the NBU's commission charged with determining related persons (the "**Commission**") issued Decision No. 2015, which designated, *inter alios*, the claimants as "related persons" (the "**Designation**"). That decision was based on an assessment of PrivatBank's relationships conducted by a monitoring department within the NBU. The result of this was that the subsequent Bail-In effectively 'zeroed' the claimants' accounts.

In their draft Re-Amended Particulars of Claim, the claimants claimed that Petro Poroshenko ("**PP**"), the then President of Ukraine, and Valeria Gontareva ("**VG**"), the then Governor of the NBU, had conspired to use their influence over the Commission and/or the NBU's monitoring department to procure the Designation with the object of depriving the claimants of funds. They alleged that this was part of a scheme to pressure Mr Surkis into transferring

his shareholding in a Ukrainian media group to PP with a view to PP's re-election in the 2019 Presidential race. They accordingly brought claims in unlawful means conspiracy, lawful means conspiracy and/or procuring a breach of contract under Cypriot law or acts contrary to Ukrainian law.

The draft Re-Amended Particulars of Claim were considerably narrower than the Amended Particulars of Claim, by which the claimants sought to impugn not only the Designation of themselves as "related parties" but also the decisions, orders, and agreements implementing the Bail-In more widely.

In responding to the claims, VG took no steps which indicated that she intended to contest the English court's jurisdiction: she filed an acknowledgment of service in which she did not tick the box indicating that she intended to contest jurisdiction; requested an extension of time for the filing of her Defence; consented to substantive amendments of the Particulars of Claim; filed and served a substantive Defence; and issued and served the summary judgment/strike out application *inter alia* on the basis that the claims against her had no real prospect of success.

In May 2021, lawyers acting for the claimants wrote to the Ministry of Foreign Affairs of Ukraine, requesting that the Minister (i) submit on behalf of Ukraine to the jurisdiction of the English court and waive any right to declare state immunity under the State Immunity Act 1978 (the "**SIA**") in respect of the claims; and (ii) confirm that Ukraine consented to the English court determining all of the issues raised in the claims. Instead of the Minister, Mr Volodymyr Lukianov responded, signing a letter as the "acting State Secretary" of the Ministry of Foreign Affairs (the "**Lukianov letter**"). The Lukianov letter stated that the claims were private law claims against the defendants, to which neither the state nor any state bodies of Ukraine were party, and that the English court was entitled to resolve the claims on that basis.

The issues as the hearing were: (i) whether the claims were barred by state immunity under the SIA; (ii) whether the claims were barred by the foreign act of state doctrine; and (iii) whether the claims had a real prospect of success.

Issue 1: State Immunity

Calver J reviewed the relevant legal principles at [43]-[63]. Under the SIA, foreign states and their officials were immune from English proceedings unless a recognised exception applied. State immunity attached to former officials in relation to acts performed in office. The critical question was whether the conduct in question was engaged in under colour of or in ostensible exercise of the official's public authority, or whether it was conduct of a private law character such as a private citizen might have entered into. This question required the court to identify the character of the act considered in the context in which the claim against the state was made. In doing so, the court was not concerned with the motivation for the act unless the motivation threw some light on the character of the act. It was irrelevant whether the official might be abusing a public power.

The claimants' case was that the defendants had no relevant official duties in connection with the Designation; they were therefore merely exerting such influence as any other private person could do. However, the pleaded case advanced against PP and VG was clearly that they used influence acquired through their official powers of appointment of the members of the Commission ([74]). Further, the context of the Designation was the Ukrainian state's nationalisation of PrivatBank, and it would be artificial to excise it from that context ([79]).

PP's alleged private or improper purpose was irrelevant. Accordingly, the claims were barred under ss. 1 and 14 of the SIA unless Ukraine had waived immunity.

According to s. 2 of the SIA, a state would waive immunity in relation to proceedings if it submitted to the jurisdiction of the UK courts. However, the steps taken by VG in responding to the claim did not give rise to a submission to the jurisdiction of the English court because the immunity belonged to Ukraine and had not been waived by Ukraine by those steps; VG, as a former official, had no authority to submit on behalf of Ukraine ([86], [96]). Further, VG was not herself a "separate entity" capable of personally submitting to the jurisdiction of the English court but merely the agent of a sovereign entity which had not submitted ([107]). In any event, the steps taken by VG did not amount to an unequivocal election not to raise state immunity: her acknowledgment of service was not inconsistent with an assertion of immunity, and she was entitled to wait to know how the case was to be pleaded against her before making her election to assert state immunity in her Defence ([108]-[109]).

The Lukianov letter did not constitute a submission by Ukraine because it was premised on the belief that the question of state immunity did not arise in the proceedings: it consented to resolution of the claims by the English court but did not constitute a waiver, which had to be express and unequivocal ([114]-[116]). Even if the Lukianov letter had amounted to a waiver, the claimants had not satisfied the court that Mr Lukianov had the requisite authority to waive immunity on behalf of Ukraine ([117]-[124]).

Issue 2: Foreign Act of State Doctrine

The foreign act of state doctrine was that the English court would not adjudicate upon the lawfulness or validity of sovereign acts of foreign states. The question in the present case was whether the second of the rules stated in *Belhaj v Straw* [2017] AC 964 applied, i.e. that the court would not question the effect of an act of a foreign state's executive in relation to any acts which take place or effect within that state's territory ([129]-[130]).

The claimants' claim was based on the core allegation that the Designation was unlawful under Ukrainian law. Given that the Designation was an integral part of the Ukrainian state's nationalisation of PrivatBank, the claim fell squarely within the second rule in *Belhaj* ([134]). While the second rule had been mainly applied to executive decisions to expropriate property, there was no principled reason why it should apply only to such decisions; the application of the rule in the present case was consistent with the principles of comity underlying the foreign act of state doctrine ([138]-[140]). In any event, the Designation did entail an interference with the claimants' property, namely the seizure of their claim rights against PrivatBank ([142]). The fact that the claimants' accounts were held at the Cyprus branch of PrivatBank did not disapply the act of state doctrine in circumstances in which the relevant sovereign act (the Designation) took place as part of a connected series of sovereign acts in Ukraine and caused loss by reason of the transfer to them of valueless shares in exchange for their claim rights pursuant to Ukrainian-law SPAs ([144]).

Calver J also rejected the claimants' contention that the foreign act of state doctrine did not apply on the basis that the Designation was unlawful under Ukrainian law. The Designation had not been declared null and void by any final decision of a Ukrainian court. In any event, the court saw considerable force in the defendants' submission that the second rule, consistently with its purpose, ought to apply to executive acts without enquiry into their

legality, at least unless the foreign state's judicial branch had validly and finally declared an executive act null and void ([153]-[158]).

Issue 3: Real Prospect of Success

The pleaded case against VG was extremely thin and based on alleged inferences from one telephone call and one meeting which post-dated the Designation ([173]). There was no properly particularised allegation as to VG's dishonesty or knowledge of the relevant transactions, the unlawful means used, or any benefit derived by VG from the Designation. The core allegation underpinning the claims that VG conspired with PP was bound to fail ([188]).

Disposal

The court granted VG reverse summary judgment on the whole claim and also struck out in their entirety the Amended Particulars of Claim (or the Re-Amended Particulars of Claim if the defendants' had consented to them); to the extent that permission was required to serve the draft Re-Amended Particulars of Claim, that permission was refused.