Case No: A3/2018/1932 & A3/2018/1933

Neutral Citation Number: [2018] EWCA 3040 Civ
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(FANCOURT J)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 18 December 2018

Before:
LORD JUSTICE LONGMORE
LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN

Between:

JSC COMMERCIAL BANK "PRIVATE BANK"

Applicant

- and -

IGOR VALERYEVICH KOLOMOISKY & ORS

Respondent

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Mr S Smith QC (instructed by **Hogan Lovells Solicitors**) appeared on behalf of the **Applicant**

Mr M Bools QC (instructed by **Field Fisher Solicitors**) appeared on behalf of the **Respondent**

Judgment
(Approved)

LORD JUSTICE LONGMORE:

1. This is a short form judgment, of a kind encouraged by the Master of the Rolls, when the judge has succinctly set out the relevant facts and the court takes the view that his conclusions were right for the reasons that he gave.

2. The issue raised by this appeal is whether various payments made by the first defendant, Mr Kolomoisky (or corporate bodies that he controls), required the prior consent of the claimant bank, or permission from the court or, alternatively, fell within the scope of the "ordinary and proper course of business" exception to a freezing order that had been made against the respondent by Nugee J on 19 December 2017.

3. The appeal itself from Fancourt J arises in the context of a claim by the applicant bank against Mr Kolomoisky and seven other named defendants for compensation under the provisions of Ukrainian law in a total sum of over $1.9 billion (US).

4. In essence, the defendants are all alleged to have misapplied, for their own benefit or for the benefit of those under their control, the assets of the applicant. Prior to the bank's nationalisation in December 2016 the bank was owned and controlled by Mr Kolomoisky and the second defendant.

5. The order of Nugee J includes a worldwide freezing injunction restraining dealing with or diminishing the value of Mr Kolomoisky's assets up to $2.6 billion (US). The order seeks to make specific and separate provision for the assets and businesses of trading companies and non-trading companies owned or controlled by the respondent directly or indirectly. The order forbids the respondent to dispose of, deal with or diminish the value of any of his assets up to the value of the relevant maximum sum as defined or:

> "In respect of bodies corporate which are directly or indirectly owned and/or controlled by the Respondent and have no trading activities (including for the avoidance of doubt any bodies corporate which are directly or indirectly owned and/or controlled by such bodies

> corporate and have no trading activities) (a '**Non-Trading Company**'), [to] procure or permit those bodies corporate to dispose of, deal with or diminish the value of any of their respective assets whether inside or outside England and Wales up to the value of the Relevant Maximum Sum. For the avoidance of doubt, this sub-paragraph does not affect the assets of trading companies."

6. The definition of the assets subject to the freezing order is extended by paragraph 5 of the order, to assets that the respondent has the power to dispose or deal with as if they were his own. It further provides:

> "The Respondent is to be regarded as having such power if a third party (which shall include a Non- Trading Company and a trustee, but not a trading company) holds or controls the asset in accordance with his direct or indirect instructions."

7. Paragraph 7 of the order provides for disclosure by the respondent from which it emerged that he controlled both trading and non-trading companies.

8. Paragraph 8 of the order contains various exceptions to the freezing provisions. Paragraph 8a permits him to spend a reasonable sum on his legal advice and representation in these or other proceedings anywhere provided that he first tells the bank's representatives where the money is to come from. Paragraph [8c] then provides:

> "This order does not prohibit the Respondent from dealing with or disposing of any of his assets in the ordinary and proper course of business, but the Respondent must give the Applicant's solicitors 2 clear working days' notice of his intention of so doing in respect of any transactions exceeding £25,000 in value. For the avoidance of doubt, no such notification is required in relation to dealings or disposals in the ordinary and proper course of business by any trading company disclosed pursuant to paragraph [7] above."

9. So far therefore as non-trading companies owned or controlled by the respondent are concerned, the respondent is prohibited from procuring or permitting them to dispose of or deal with their assets up to the specified maximum sum. Their assets are treated as his assets but, subject to prior notification, they may be disposed of or dealt with in the ordinary and proper course of business. It is common ground that this includes the course of any such company's business and is not limited to Mr Kolomoisky's business personally.

10. Mr Kolomoisky has a complex network of corporate bodies, in various jurisdictions around the world, that he owns or controls. Substantial disclosure of these were made pursuant to the terms of the orders of Nugee J and later Roth J. This appeal is concerned with sample transactions firstly, between Selantia Ltd (a British Virgin Islands company), A Co, (a Belizean company) and Atrasten Ventures Ltd (another British Virgin Islands company). Secondly, between Goiania (a Portuguese company), Perkela Service Ltd (a British Virgin Islands company and Redhill Ltd (a Belizean company) and thirdly the B Co, a Ukrainian company and Stalmag (a Polish company).

11. Reference may be made to the judgment below for the facts which are not in dispute. The judge decided that payments of interests made pursuant to a loan agreement between Atrasten as lander and non-trading company, A Co, as borrower, were within the ordinary course of A Co's business when that company used that borrowed money to buy 24% of shares in C Co, which owned D Co. To make the repayments A Co borrowed sums from another company controlled by Mr Kolomoisky, namely Selantia. For good measure the judge held that that payment by Selantia was within the ordinary course of Selantia's business though, of course, any sum paid by Selantia to A Co would *prima facie* be within the injunction. The critical questions are whether A Co had a course of business and whether monthly payments of interest were made in the ordinary course of that business. The payments had begun well before the freezing order was made on 19 December 2017.

12. The judge further decided that payments made by Goiania (a company which does trade by acquiring and leasing aircraft) pursuant to an agency agreement made with Perkela, who leased an aircraft for the use of Mr Kolomoisky from UBS, was likewise in the

ordinary course of Goiania's business. Those payments also began before the freezing order was made. The judge held, correctly, that the freezing order contemplated that the trading companies owned and controlled by Mr Kolomoisky could have an ordinary course of business. He then determined, as a matter of fact, that payments were in fact made in the ordinary and proper course of that business conducted by a company and Goiania. That was, in my judgment, a finding open to the judge.

13. Mr Smith QC, for the bank, submitted that in each case only one transaction existed and that that could not be a transaction within the ordinary course of business. He also submitted that the judge failed to follow the guidance given by this court in JSC BTA Bank v Ablyazov (No 3) [2010] EWCA Civ 1141, especially at paragraph 76, that the exception for the ordinary course of business should be narrowly construed. Mr Smith also said that none of the non-trading companies owned or controlled by Mr Kolomoisky had the usual indicia of a business in the form of company accounts, customers and invoices and that kind of thing.

14. However, the judge had all these considerations in mind when he concluded that the payments being made (well before, as I say, the injunction was granted) were made in the ordinary course of business. He held, in the context of the order made by Nugee J (paragraph 28):

> "... the business must have some commercial activity rather than merely corporate or regulatory arrangements necessary to keep the company in existence to hold assets. Further, there must be some course of commercial activity or activities before it can be said that a transaction or payment is in the ordinary course of a company's business. Beyond those broad generalities, it is a question of fact and degree whether what is done by any of the particular companies in consideration here amounts to an ordinary course of business."

15. He then went on in paragraph 29:

> "Although A Co. apparently has only a very limited corporate purpose, it has entered into a series of financially significant commercial transactions, giving rise to rights and obligations, which it has performed and observed over an extended period of time. The business of A Co. was to fund, acquire and hold a shareholding in C Co. and thereafter to finance the purchase. Prior to the date of the freezing order, A Co. was both performing its obligations and exercising its rights under the two principal commercial contracts into which it had entered. Although the extent of its business was very limited, it nevertheless appears to me to have had an established course of business at the time of the first freezing order."

16. Mr Smith submitted that the judge here jumped from finding that A Co had a corporate purpose to saying that A Co had a business and then made a further jump to hold that the payments were made in the ordinary course of that business. But the paragraph that I have just quoted showed no such athletic feats; it was merely a conclusion of fact that A Co was conducting a business and payments were being made in the course of that business - a conclusion with which an appellate court should not interfere.

17. Mr Smith made the same sort of points about the Goiania transaction, particularly that the agency agreement was a one-off agreement, without ancestry, siblings or progeny. As to that the judge said:

> "... the Agency Agreement is a commercial contract under which Goiania has substantial obligations and rights. Goiania was entitled to an annual fee, a Security Fee at a rate of 7.5% per annum and a commission of 1.5% of the total amount paid by it using moneys from Perkela/Redhill. Accordingly, in my judgment, Goiania's business at the time of the first freezing order was a commercial aircraft leasing business and a business of acting as commercial agent for Perkela and Redhill. The fact that the agency business was limited to one particular case does not mean that it was not part of Goiania's business at the relevant time."

18. That was plainly a finding open to the judge on the evidence and I would dismiss the bank's appeals.

19. I turn then to Mr Kolomoisky's appeal in relation to the judge's finding that payments, made by Mr Kolomoisky on behalf of B Co to his own and B Co's lawyers in respect of fees incurred in a bilateral international treaty arbitration brought by both of them against the Russian Federation for illegally annexing B Co's passage terminal at an airport in Ukraine when Russia invaded Crimea, were not made in the ordinary course of Mr Kolomoisky's business. The judge held, on the evidence provided by Mr Waugh's witness statement, made on Mr Kolomoisky's behalf, that Mr Kolomoisky's activity was not the kind of activity to which the ordinary course of business exception was intended to apply. He said in paragraph 56 of the judgment:

> "It [that is the exception] applies, in this context at least, to the businesses of the trading or non-trading entities that the respondent controls. The nature of the respondent's commercial and financial activity is not to have a business himself but to invest in and organise business activities through corporate entities. The respondent's own investment and management activity cannot reasonably be described as the ordinary course of a business, at least in this context. If it were, everything that the respondent chose to do in terms of managing, dealing in and disposing of his assets and investments would be excluded from the effect of the freezing injunction. If, on the other hand, the respondent did have a personal business, there would be real issues to address about what was and what was not in its ordinary and proper course. The conclusion that the respondent invites the Court to reach would effectively deprive that important distinction of having any real application in his case.applies in this context at least to the businesses."

20. Mr Bools QC, for Mr Kolomoisky, submitted that this was wrong because Mr Kolomoisky's involvement in managing the companies he controlled through which he did his business was itself a business. He bolstered that submission by saying that the

order itself contemplated that Mr Kolomoisky could have a business and that the judge misapplied Ablyazov (No 3) by ignoring the last sentence of paragraph 76 in that case because Mr Kolomoisky had shown that, when he called in a loan he had made to Stalmag and used it to pay B Co's lawyers' fees in the arbitration, he was running a business of his by making changes in holdings rather than reorganising his investments. In fact, said Mr Bools, the judge in paragraph 55 had recognised this by saying that Mr Kolomoisky agreed the sources of funding from various parts of his group and decided himself where and how that was to be done. Once he so concluded that should, said Mr Bools, have been the end of the matter.

21. But the judge, rightly in my judgment, did not think it was the end of the matter and concluded, as a matter of fact, that Mr Kolomoisky chose to conduct his affairs through corporate vehicles which had a business but Mr Kolomoisky did not himself have a business. His management of his investments could not be described as the ordinary course of business in the context of this injunction.

22. That was, I consider, a conclusion open to the judge with which, again, this court should not interfere. The cross appeal will therefore be dismissed.

23. This appeal comes before the court in circumstances in which Fancourt J has now decided that there was no jurisdiction to bring the claim in England in the first place and that there was non-disclosure at the time of the application for the injunction sufficiently substantial to justify its discharge. There is thus a complete air of unreality to this appeal which will only become non-academic if this court grants permission to appeal the non-disclosure issue which was, of course, a matter for the judge's discretion. It is on that slender basis that we nevertheless decided we should continue to hear this appeal for which the judge himself gave permission.

24. It is however worth observing that polocing freezing injunctions is very much a matter for the first instance court. Appeals on the ordinary course of business should be rare and even more rarely be allowed. Judges at first instance should be trusted to know what is the ordinary and indeed the proper course of business. If there is to be satellite litigation of this nature, it should normally go no further than the first instance judge.

25. For the reasons I have given, in my view, both these appeals should be dismissed.

LORD JUSTICE PETER JACKSON: I agree.

LADY JUSTICE ASPLIN: I also agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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